a 8898

KN
365.2
BAT

MIDDLE TEMPLE LIBRARY
WITHDRAWN STOCK

A TREATISE

ON THE

Jurisdiction, Pleadings and Practice

68/109

OF

THE COUNTY COURTS,

IN EQUITY.

BY

EDMUND CHISHOLM BATTEN, M.A.,

AND

HENRY LUDLOW, M.A.,

OF LINCOLN'S INN, ESQRS, BARRISTERS AT LAW.

LONDON:

WILLIAM AMER, LINCOLN'S INN GATE,

Law Bookseller and Publisher.

1866.

RAYNER AND HODGES, PRINTERS, FETTER LANE, E.C.

PREFACE.

THE law administered by Courts of Equity has frequently commanded the favourable attention of the jurist and the philosopher, both on the ground of the high moral standard on which its principles are founded, and on account of the plasticity by which it has been able from time to time to adapt itself to the varying exigencies of a civilised and progressive state of society (*a*). "Almost "all the principles," says Vice Chancellor KINDERSLEY (*b*), "which are acted upon by a Court of Equity, in point of "fact, are pervaded by a higher, and purer, and more "exalted tone of morality than that which prevails among "mankind, even among the moral portion of mankind." "Of all parts of the English legal system," says Mr. J. S. MILL (*c*), "the Court of Chancery, which has the best "substantive law, has hitherto been the worst as to delay,

(*a*) "I think it the duty of this Court," said Lord Chancellor COTTENHAM, "to adapt its practice and course of proceeding to the existing state of "society, and not by too strict an adherence to forms and rules, established "under different circumstances, to decline to administer justice and to "enforce rights for which there is no other remedy."—*Wallworth* v. *Holt*, 4 M. & C., p. 635.

(*b*) *Bodenham* v. *Hoskins*, 21 L. J. N. S. Ch. 872.

(*c*) Pol. Economy, vol. 2, p. 480 (5th edition).

"vexation and expense." It may be, for the reasons to which Mr. MILL refers, that this admirable system of jurisprudence has not had its full influence upon the thoughts and conduct of the nation at large. And, indeed, so long as equity was, with trifling exceptions, administered in London only, it was not easy to devise any means by which its costliness could be materially diminished (*a*). The legislature, having by the Act of last session established various local tribunals for the administration of equity, has taken a considerable step towards disseminating a general knowledge of its principles and practice.

The design of the present work is to furnish the practitioner with a convenient and portable treatise on each head of the equitable jurisdiction conferred upon the County Courts by the statute in question.

The Authors have thought it would not be unacceptable to the Profession, especially to those gentlemen practising in the country, that a short outline of the Principles of equity, applicable to each branch of the new jurisdiction, should be given, illustrated by the latest cases which have been decided by the Court of Chancery on the subject.

Doubts seem to have suggested themselves, whether the Pleadings and Practice of the Court of Chancery have any bearings upon the pleadings and practice to be adopted in the County Courts in equity.

The Pleadings in a Court of Equity flow so regularly from, and are so completely moulded by, its principles, that even if the Act giving jurisdiction in equity to the County Courts were less explicit, the Judges would

(*a*) See the 1st Report of the Chancery Commission, p. 164 (App. A.)

naturally desire the pleadings in suits before them to be framed according to the rules which obtain in the Court of Chancery; just as the Equity Court of Exchequer, although not bound to do so, insisted that the pleadings before it should be generally similar to those used in Chancery.

The Practice of a Court of equity does not so necessarily follow from its principles. Some difference existed between the practice of the Court of Chancery and of the Equity Exchequer. But the language of the New Act is too distinct to permit the Judges to be guided by any other analogy, when the Orders issued under it are silent, than that afforded by the practice of the Chancery Judges whose powers and authorities are given to them. Had the hypothesis of its want of authority been admissible, the practice of the Court of Chancery would still form an exemplar of ascertained merit for imitation by the New Courts. It, in fact, embodies the conclusions arrived at by the ablest minds during many years of experience as to the mode in which the theory of equity is best applied to actual facts.

Acting upon these views, the Authors, in treating of the Pleadings and Practice to be adopted in the County Courts under the new jurisdiction, have assumed that the main principles and rules of procedure sanctioned by the Court of Chancery will be followed.

The work commences by an outline of the general course of procedure in every suit. This forms the General Part. The Special Part goes into detail as to the pleadings and practice in each particular species of suit. The Appendix is divided into two parts. Part I. contains the rules, orders and forms issued under the Act. Part II. contains all those legislative enactments which

are of practical utility, arranged so as to correspond with the divisions of the text, and a few extracts from the consolidated orders of the Court of Chancery, which seemed to partake of the same character as the statutes.

The Authors desire to acknowledge their obligations to Mr. William Barber, of the Chancery Bar, for the valuable assistance afforded by him, more especially in the Chapters which treat of the Trustees Relief Acts and the Trustee Acts, and to Mr. John Edwards, of the Chancery Bar, for the care and labour he has kindly bestowed on the Table of Cases.

Whatever practical utility the work may be thought to possess is, to a great extent, owing to the skill with which the General Index has been planned, and the care and assiduity with which it has been executed, by Mr. Jason Smith, of the Chancery Bar.

E. Chisholm Batten,
Henry Ludlow.

9, *New Square, Lincoln's Inn.*
May, 1866.

CONTENTS OF THE TEXT.

PART I.

	Page
General Part	9—48

PART II.

SPECIAL PART.

CHAPTER I.

Administration Suits	51—97

CHAPTER II.

Execution of Trusts	98—138

CHAPTER III.

Foreclosure and Redemption	139—188

CHAPTER IV.

Specific Performance	189—233

CHAPTER V.

PAGE

CANCELLATION OF AGREEMENTS . . 234—262

CHAPTER VI.

TRUSTEES RELIEF ACTS . . . 263—277

CHAPTER VII.

THE TRUSTEE ACTS, 1850 AND 1852 . . 278—293

CHAPTER VIII.

MAINTENANCE AND ADVANCEMENT, AND LAW OF INFANTS GENERALLY . . . 294—302

CHAPTER IX.

PARTNERSHIP . . . . . 303—331

CHAPTER X.

ORDERS IN THE NATURE OF INJUNCTIONS . 332—336

APPENDIX.

PART I.

ORDERS AND RULES FOR REGULATING THE PRACTICE OF THE COUNTY COURTS (1865).

ORDER I.

Plaint and Summons.

Rule		Page
1.	Commencement of suit	337
2.	Names	337
3.	Plaint	338
4.	Plaint filed by attorney	338
5.	Form of plaint	338
6.	Delivery to registrar and filing of plaint	338
7.	Summons on plaint	338
8.	Date and return of summons	338
9.	Service of summons	339
10.	Service when defendant is out of jurisdiction of County Courts	339

ORDER II.

Proceedings after Service.

1.	Admissions	339
2.	Notice of admissions	339
3.	Statement in the nature of a disclaimer or answer may be filed by defendant	339
4.	Statement to be filed	340
5.	Statement filed by attorney	340
6.	Dismissal of suit	340

ORDER III.

Evidence.

1.	Evidence to be taken *viva voce*	340
2.	As to the admission of documents	340
3.	Inspection of documents in possession or control of an opposite party	341
4.	Summons to witness	341
5.	Compulsory production of documents by parties to suit	342
6.	Documents unobjected to received without formal proof	342
7.	Affidavit	342
8.	Examination *de bene esse*	342
9.	Special examination	342
10.	How examination conducted	342
11.	Allowance to witnesses	343

ORDER IV.

Hearing.

Rule		Page
1.	How parties to come prepared	343
2.	Hearing	343
3.	Affidavits	343
4.	Decree or decretal order	343
5.	Jury	343
6.	Record for trial	344

ORDER V.

Decretal Orders.

1.	Registrar to draw order	344
2.	Preparation of a deed	344
3.	Receiver	344
4.	Sale of real property	344
5.	Sale of personal property	344
6.	Accounts or inquiries	344

ORDER VI.

Execution of Decretal Orders.

1.	Deed, how settled	344
2.	In taking accounts, &c., registrar to be chief clerk	345
3.	In taking accounts, account books to be *primâ facie* evidence of the matters therein contained	345
4.	Advertisement for creditors, &c.	345
5.	Creditors need not attend without notice	345
6.	Securities, deeds and documents to be produced to registrar	345
7.	Pedigree or proof to be produced to registrar	346
8.	Costs when not allowed	346
9.	Proof of debts or claims	346
10.	Notice of allowance	346
11.	Claims not before made	346
12.	Claims too late	346
13.	Allowances	346
14.	Application to judge for further directions *mero motu*	347

ORDER VII.

Absent Parties.

1.	Inquiry as to parties	347
2.	Notice to parties	347
3.	Application to vary or add to decretal order	347

ORDER VIII.

Registrar's Certificate.

1.	Registrar's certificate	347
2.	Registrar's certificate to lie in office	347
3.	Variation of registrar's certificate	348
4.	Confirmation of certificate	348

ORDER IX.

Final Decree.

	Final Decree	348

ORDER X.

Revivor and Supplement.

Rule		Page
1.	Order under 15 & 16 Vict. c. 86, s. 52	348
2.	Order to be served	348
3.	Person served to be bound thereby and may appeal	348

ORDER XI.

Proceedings under the 5th, 6th and 8th Clauses of the 1st Section.

1.	Petition	349
2.	Petitions by trustees	349
3.	Petitions by guardian or trustee of infant or next friend	349
4.	Application for injunction	349
5.	Time of filing petitions and giving notices	350
6.	Registrar to issue notices	350
7.	Service of petitions and notices	350
8.	Facts may be supported by affidavit	350
9.	Registrar to draw up order	350
10.	Orders as to suits to extend to proceedings	350

ORDER XII.

Ex parte Applications.

1.	Peremptory motions	350
2.	Orders, how drawn	351
3.	Orders, how drawn and executed	351

ORDER XIII.

Amendments.

	Amendments	351

Note.—C. C. Rules, 1857, 91—100.

[91.	Wrong person made defendant	352
92.	Party wrongly suing or sued *in auter droit*	352
93.	Party wrongly suing or sued in his own right	352
94.	Misnomer of plaintiff	352
95.	Misnomer of defendant	352
96.	Misjoinder or nonjoinder of wife	352
97.	Misjoinder of plaintiffs	352
98.	Nonjoinder of plaintiffs	353
99.	Misjoinder of defendants	353
100.	Defendants not served	353]

ORDER XIV.

Affidavits.

1.	Affidavits to be expressed in the first person	353
2.	Sources of knowledge to be stated	353
3.	Costs of affidavits when disallowed	353
4.	Filing of affidavits	354
5.	Erasure, blotting, interlineation, &c., in affidavits	354

ORDER XV.

Rehearing.

	Rehearing to be allowed on special grounds only	354

ORDER XVI.

Enforcement of Decrees and Orders.

Rule		Page
1.	Service of decree or order	354
2.	When execution may issue	354
3.	Warrant of *fi. fa.*	354
4.	Warrant of possession or assistance	355
	[Note.—Power of County Court to commit for breach of injunction or order,	355
	Order of committal	357
	Warrant of committal	357]

ORDER XVII.

Funds in Court.

1.	Registrar to obey, in the receipt and payment of monies under this Act, the Treasury instructions	358
2.	Payment into Court	358
3.	Investment of monies under order of Court	358
4.	Interest on investments	358
5.	Where sum less than £30 it may be invested in Post Office Savings Banks	359
6.	Service of order under section 5 of the Act	359
7.	Where default made in payment to Accountant General of the Court of Chancery	359
8.	Married women	359
	[Note.—Equity to a settlement	359]

ORDER XVIII.

Transfer of Proceedings to Court of Chancery.

	Transfer to Court of Chancery where subject-matter exceeds the amount to which jurisdiction is given by Act	362

ORDER XIX.

Appeal.

1.	Appeal to be by case	362
2.	Notice of appeal	363
3.	Proceedings not to be stayed unless Vice Chancellor or Judge otherwise order	363
4.	Case to be signed by judge	363
5.	When parties do not agree on case, judge to settle same	363
6.	Copy of case deposited with registrar	363
7.	Case to be transmitted	364
8.	If appeal not prosecuted, successful party to proceed	364
9.	Entering judgment on appeal	364
10.	Appeal to Lancashire Court of Chancery	364

ORDER XX.

Duties of Registrar.

1.	Registrar to keep books and enter proceedings therein	364
2.	Documents to be distinguished by the number of the plaint and letters	364
3.	Duty of registrar when he rejects affidavits, or where documents are imperfect	365
4.	Summons, &c., to be sealed	365
5.	Registrar to appoint time and place for inquiries and taking accounts	365

RULE PAGE
6. Hearing before registrar 365
7. Further time for certificate 365
8. Registrar to retain money to abide result of appeal . . 365

ORDER XXI.

Duties of High Bailiff.

1. As to sale of personal property 365
2. Services and executions 365
3. Possession 365
4. Payment over of money 366

ORDER XXII.

Duties of Receiver.

1. Receiver to give security 366
2. His accounts to be audited by registrar, and when . . 366
3. To produce voucher, and, if required, verify on oath . . 366
4. To produce account for audit upon notice . . . 366
5. Audit once a year 366
6. Parties need not attend audit 366
7. Court may order income to be paid direct to parties . . 367

ORDER XXIII.

Practice.

1. Proceedings may be wholly or partly printed . . 367
2. Documents to be sealed 367
3. Service 367
4. Change of attorney 367
5. Setting down for hearing 367
6. Days for equity sittings 367
7. Where Christian name unknown 367
8. Copies of documents for use of Judge . . . 368
9. Copy of proceedings to be forwarded to Judge . . 368
10. Registrar to prepare all copies 368
11. Acts may be done by counsel or attorney . . . 368
12. Service on attorney sufficient except where personal service is required 368
13. Service may by leave of the Registrar be effected by the attorney 368
14. Substituted service 368
15. Judges to order in what newspapers advertisements to be inserted, and costs thereof to be prepaid 368
16. Advertisements in London Gazette 368
17. Conduct of suit 368
18. Court may enlarge or abridge periods mentioned in these orders . 369
19. Undertaking by next friend to pay costs . . . 369
20. Transfer of suits or proceedings from one Court to another in certain cases 369
21. Taxing officer 369
22. Interest on debts 369
23. Interest on legacies 370
24. Decrees to be registered 370
25. Forms 370
26. General practice rule 370

ORDER XXIV.

Interpretation.

Interpretation 370

LIST OF FORMS.

	PAGE
1. Undertaking by next friend of infant to be responsible for defendant's costs	372
2. Affidavit in support of application for substituted service	372
3. Order for substituted service	373
4. Administration.—[Clause 1 of sect. 1]	373
By creditor	373
By legatees (specific)	374
By legatees (pecuniary)	374
By legatees (residuary)	374
Next of kin.	374
5. Execution of trusts.—[Clause 2 of sect. 1]	375
6. Foreclosure.—[Clause 3 of sect. 1]	375
Redemption	376
7. Specific performance.—[Clause 4 of sect. 1]	377
8. Under Trustee Relief Act.—[Clause 5 of sect. 1]	377
9. Under Trustee Acts	378
10. Maintenance and advancement of infants.—[Clause 6 of sect. 1]	379
11. Partnership.—[Clause 7 of sect. 1]	379
12. Notice of application for order in the nature of injunction.—[Clause 8 of sect. 1]	380
13. Summons on plaint	381
14. Notice to admit and inspect	382
15. Application for summons to produce	383
16. Summons to witness	384
17. Defendant's admission	384
18. Affidavit of signature to defendant's admission	384
19. Defendant' statements	385
20. Decretal order.—Administration suit	386
In creditors' suit	386
In suits by legatees	386
In suits by next of kin	386
21. Form of order under Order VI., rule 14, or under Order XII.	387
22. Form of order under Order VI., rule 14, or under Order XII.	388
23. Decretal order for reference in foreclosure suit by legal mortgagee	388
24. Decretal order for sale in a suit by a legal or equitable mortgagee or person entitled to a lien	389
25. Decretal order.—Dissolution of partnership	390
26. Final decree for foreclosure	390
27. Partnership	
Final decree	391
28. Notice of decretal order to absent party	391
29. Notice to creditor to prove his claim	392
30. Notice to creditor of allowance of claim	392
31. Registrar's certificate	392
Notice of decretal order	392
Personal estate account	393
References to account	393
Variation from accounts	393
Special allowances in accounts	393
Reference to transcript of account	393
No personal estate received	393
Funeral expenses	393
Debts	394
Interest on debts	394

PAGE

Legacies and annuities 394
Interest on legacies 394
Outstanding estate 394
Real estate 394
Incumbrances on real estate 394
Rents and profits account 394
No rents and profits received . . . 395
Next of kin 395
32. Notice that registrar's certificate may be inspected . . 395
33. Bond to be given by receiver 395
34. Warrant of execution on a decree or order of the Court for the payment of money 396
35. Warrant of assistance 397
36. Warrant of possession 398
37. Notice of change of attorney 398
38. Order of revivor 398
39. Order of payment of legacy into Court of Chancery . . 399
40. Order of transfer of suit or matter to Court of Chancery . 400
41. General heading for and endorsement on decretal order or decree . 400
42. Mem. to be placed at foot of every summons, notice, decree, or order of Court, or any other process of the Court . . 401
43. Allowance to witnesses 401

BOOKS.

A.—Suits and proceedings in equity book . . . 401
B.—Cash book 404
C.—Ledger 404

Scale of costs 405
Registrar's fees 408
High Bailiff's fees 410
ORDER AS TO TRANSFER TO COURT OF CHANCERY . . 410

PART II.

STATUTES.

STATUTES RELATING TO THE PRACTICE AND JURISDICTION GENERALLY.

ACT TO DIMINISH THE DELAY AND EXPENSE OF PROCEEDINGS IN CHANCERY (13 & 14 Vict. c. 35).

SECT. PAGE

28. Power for the Court notwithstanding any rule, &c., to the contrary, to receive proof by affidavit 411

MASTER IN CHANCERY ABOLITION ACT (15 & 16 Vict. c. 80).

11. Power to Master of the Rolls and Vice Chancellors to sit at chambers for the despatch of business, &c. . . . 412
13. Judge to have same power and jurisdiction as in open Court . 412
14. Orders made in chambers to be ordinarily drawn up by Judges' clerks, but Judges may direct them to be drawn up by registrars of the Court, and may require their attendance at chambers for that purpose 412

Sect.		Page
15.	Orders made at chambers to have same force as orders of Court, &c.	412
26.	Business to be disposed of in chambers by the Judges	412
27.	Judges may adjourn from open Court to chambers, and *vice versâ* the consideration of any matter	413
28.	Mode of proceeding before Judges at chambers to be by summons as at common law	413
29.	Power to the Judges to direct what matters &c., shall be heard and investigated by themselves, and what by their chief clerks. Right to suitor to bring any point before the Judge	418
30.	Power to chief clerks to issue advertisements and summonses, to administer oaths, &c., as the Judge shall direct	413
31.	Parties, &c., not attending, liable to process of contempt and to penalties for false swearing, &c.	413
32.	Result of proceedings before chief clerk to be embodied in form of short certificate, &c.	414
33.	No exceptions to lie to certificate, &c. Parties at liberty to take opinion of Judge upon any particular point	414
34.	Certificate, &c., signed and adopted by Judge, binding on all parties unless discharged or varied	414
42.	Power to obtain the assistance of accountants, merchants, &c.	414
43.	Taxing Master to regulate fees to conveyancing counsel, &c., subject to appeal	414

IMPROVEMENT OF THE JURISDICTION OF EQUITY ACT (15 & 16 Vict. c. 86).

10.	Bills of complaint to contain concise narratives of material facts, &c., divided into numbered paragraphs, but not to contain interrogatories	415
11.	Person whose name is used as next friend of any infant, &c., in any suit, &c., to sign a written authority	415
18.	Court or Judge may order defendant to produce documents, &c., on oath	415
20.	Upon application of defendant after answer, plaintiff may be required to produce documents on oath	415
22.	Pleas, declarations, &c., in Chancery, how to be sworn and taken in Scotland, Ireland, and the Channel Islands	415
23.	Penalty for falsely swearing, &c.	416
24.	Penalty for forging signature or seal of Judge, &c., empowered to administer oaths under this Act	416
25.	Answer, &c., to be filed without oath of messenger	416
31.	Witnesses to be examined by one of the examiners of the Court in the presence of the parties	416
32.	Depositions to be taken down in writing, and read over to the witness, who shall sign the same in the presence of the parties, but if he refuse to sign, examiner may, and state any special matter he may think fit	417
33.	If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted. Proviso as to witness demurring to questions	417
34.	Original depositions to be transmitted to the Record Office, and filed	417
35.	Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths	418
37.	Affidavits to be divided into paragraphs, numbered	418
41.	Evidence subsequent to hearing to be taken the same as prior to the hearing	418
42.	Defendant not to take objection for want of parties in any case to which rules therein set forth shall extend	418

SECT. PAGE
44. Court may proceed in any suit, &c. without representative of deceased person, or may appoint one . . . 419
48. Court may direct sale of mortgaged property instead of a foreclosure on such terms as it may think fit . . . 419
49. Suit not to be dismissed for misjoinder of plaintiffs, but Court may modify its decree according to special circumstances . . 420
50. No suit to be objected to because only declaratory order sought . 420
51. Court may decide between some of the parties, without making others interested parties to the suit. Proviso . . 420
52. In case of abatement, &c., of suit, an order may be made which shall have same effect as a bill of revivor . . . 421
53. New facts, &c., after commencement of suit, to be introduced as amendments to bill, &c. 422
54. Where account required to be taken, Court may give special directions as to the mode of taking same . . . 422
55. Court may order real estate to be sold, if required . . 422
56. Before sale of estate abstract of title to be laid before some conveyancing counsel. Time for delivery of abstract to be specified in conditions of sale 422
57. Where real or personal property is the subject of proceedings, Court may allow to parties part or the whole of the annual income . 423
60. In case directions as to parties, &c., not followed, Court may make order and award costs . . . . .
61. Court of Chancery not to direct cases to be stated for opinions of Court of Common Law, but to decide the same . . 423
62. Court may determine legal title of party seeking relief, without requiring parties to proceed at law 423

CHANCERY AMENDMENT ACT, 1858 (21 & 22 Vict. c. 27).

1. Commencement of Act. Short Title . . 424
3. Damages may be assessed, or question of fact arising in any suit may be tried by a jury before the Court itself . . . 424
7. Where parties are competent to make admissions, any party may call on any other party to admit documents . . 424

CHANCERY REGULATION ACT, 1862 (25 & 26 Vict. c. 42).

1. Court shall determine every question of law and fact incident to the relief sought 425
2. Where questions of fact may be more conveniently tried at assizes, issues may be directed 425
3. Provisions of 21 & 22 Vict. c. 27 to apply to this Act . . 425
4. Proviso in cases where object of suit to recover or defend possession of land under a legal title 426
5. Court of Chancery may sit with assistance of a common law Judge . 426
6. Commencement of Act. Short title . . . 426

STATUTE RELATING TO ADMINISTRATION.

LAW OF PROPERTY AND TRUSTEES RELIEF AMENDMENT ACT (22 & 23 Vict. c. 35).

29. As to distribution of the assets of testator or intestate after notice given by executor or administrator . . . 426

CONSOLIDATED ORDER XXXV.

RULE.
33. Accounts to be verified by affidavit numbered and left in chambers . 427

STATUTES RELATING TO TRUSTS.

ACT TO CONSOLIDATE AND AMEND THE STATUTE LAWS RELATING TO LARCENY AND OTHER SIMILAR OFFENCES (24 & 25 Vict. c. 96).

SECT. PAGE
80. Trustees fraudulently disposing of property guilty of a misdemeanor. 427
No prosecution shall be commenced without the sanction of some Judge or the Attorney General 427
85. No person to be exempt from answering questions in any Court, but no person making a disclosure in any compulsory proceeding to be liable to prosecution 427
86. No remedy at law or in equity shall be affected. Convictions shall not be received in evidence in civil suits . . . 428

LAW OF PROPERTY AND TRUSTEES RELIEF AMENDMENT ACT (22 & 23 Vict. c. 35).

32. As to investments by trustees 428

LAW OF PROPERTY FURTHER AMENDMENT ACT (23 & 24 Vict. c. 38).

10. Power to Lord Chancellors, &c., of England and Ireland to make general orders as to investment of cash under the control of the Court 428
11. Trustees, &c., to invest trust funds in the stocks, &c., in which cash under the control of the Court may be invested . . 429
12. Clause 32 of 22 & 23 Vict. c. 35 to Act retrospectively 429

STATUTES RELATING TO FORECLOSURE AND REDEMPTION.

ACT TO ABOLISH ARREST ON MESNE PROCESS (1 & 2 Vict. c. 110).

13. Judgment to operate as a charge on real estate. Charge not to be enforced until after the expiration of a year. Proviso as to purchaser, &c. 430

LAW OF PROPERTY FURTHER AMENDMENT ACT (23 & 24 Vict. c. 38).

1. Writs of execution of judgments to be registered . . 431

JUDGMENT LAW AMENDMENT ACT (1864) (27 & 28 Vict. c. 112).

1. Future judgments, &c., not to affect land until land delivered in execution 432
2. Interpretation of terms 432
3. Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38 432
4. Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale . . 432
5. Where there are other creditor's notice of sale to be served upon them 432
6. Parties claiming interest through debtor bound by order for sale . 433

STATUTE RELATING TO SPECIFIC PERFORMANCE.

CHANCERY AMENDMENT ACT, 1858 (21 & 22 Vict. c. 27).

2. Power of Court of Chancery to award damages in certain cases 433

TRUSTEES RELIEF ACTS.

Trustee Relief Act, 1847 (10 & 11 Vict. c. 96).

Sect.		Page
1.	Trustees may pay trust monies or transfer stocks or securities into the Court of Chancery	433
1.	Receipt of bank cashier or certificate of proper officer to be sufficient discharge	434
2.	Court of Chancery to make orders on petition without bill for application of trust monies and administration of trust	434
3.	Regulating salary of Accountant General	434
4.	Lord Chancellor with Master of the Rolls, &c., may make general orders	435
5.	Construction of expression "Lord Chancellor"	435
6.	Act may be amended, &c.	435

Consolidated Order XLI.

Rule		Page
1.	Affidavit of trustee	435
2.	Payment, &c., how directed and certified	435
3.	Statement as to non-investment. Investment where no such statement	435
4.	Notice of payment, &c.	436
5.	Application by petition or summons, by whom made	436
6.	Notice to trustee	436
7.	Notice to *cestui que trust*	436
8.	Place for service	436
9.	Title of petitions, &c.	436

Trustees Further Relief Act (12 & 13 Vict. c. 74).

Sect.		Page
1.	Court of Chancery may, upon application by majority of trustees, &c., order payment or transfer of trust monies, stocks or securities into Court of Chancery	437
2.	Act may be amended, &c.	437

Act to Diminish the Delay and Expense of Proceedings in Chancery (13 & 14 Vict. c. 35).

19.	Court on application of executors or administrators may by order of course direct it to be referred to a Master to take an account of debts and liabilities	438
20.	Master's report may be objected to by motion to the Court, of which notice shall be given	438
21.	Proceeding of the Court on such motion	439
22.	If debts or certain liabilities allowed and not paid or provided for, order may be made for payment or accounts.	439
23.	Court on application of executors or administrators may direct appropriation of money to answer contingent liability	439
24.	Court may restrain proceedings against executors and administrators	440
25.	Protection to be afforded to executors and administrators	440
	Schedule referred to by the foregoing Act	440

Law of Property and Trustees Relief Amendment Act (22 & 23 Vict. c. 35.)

30.	Trustee, executor &c., may apply by petition to Judge of Chancery for opinion, advice, &c., in management, &c. of trust property	441

LAW OF PROPERTY FURTHER AMENDMENT ACT (23 & 24 Vict. c. 38).

SECT. PAGE
14. Order to take account of debts, &c. of deceased person under sect. 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted 442

TRUSTEE ACTS.

THE TRUSTEE ACT, 1850, (13 & 14 Vict. c. 60.)

1. Repeal of 11 Geo. 4 & 1 Wm. 4, c. 60; 4 & 5 Wm. 4, c. 23; and 1 & 2 Vict. c. 60. 443
2. Interpretation of terms 443
3. Lord Chancellor may convey estates of lunatic trustees and mortgagees 445
4. May convey contingent rights 445
5. Lord Chancellor may transfer stock of lunatic trustees and mortgagees 445
6. Power to transfer stock of deceased person . . . 446
7. Court of Chancery may convey estates of infant trustees and mortgagees 445
8. Contingent rights of infant trustees and mortgagees . . 446
9. Court of Chancery may convey the estate a trustee out of the jurisdiction of the Court 446
10. Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of Court, &c. . . 446
11. Contingent rights of trustees 447
12. Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the Court to a contingent right in lands 447
13. When it is uncertain which of several trustees was the survivor . 447
14. When it is uncertain whether the last trustee be living or dead . 447
15. When trustee dies without an heir 447
16. Contingent right of unborn trustee 448
17. Power to convey in place of a refusing trustee. [*Repealed by* 14 & 15 *Vict. c.* 55, *s.* 2, p. 460.] 448
18. Power to convey in place of person entitled to contingent right [*Repealed by* 14 & 15 *Vict. c.* 55, *s.* 2, p. 460.] . . . 448
19. Power to convey in place of mortgagee 448
20. Power to appoint a person to convey in certain cases . . 449
21. As to lands in Lancaster and Durham 450
22. When trustees of stock out of the jurisdiction . . . 450
23. When trustee of stock refuses to transfer 451
24. When one of several trustees of stock refuses to transfer or receive and pay over dividends 451
25. When stock is standing in the name of a deceased person . 451
26. Effect of an order vesting the legal right to transfer stock . 451
27. Effect of an order vesting legal right in a *chose in action* . 452
28. Effect of an order vesting copyhold lands or appointing any person to convey copyhold lands 452
29. When a decree is made for sale of real estate for payment of debts . 453
30. Court to declare what parties are trustees of lands comprised in any suit and as to the interests of persons unborn . . . 453
31. Power to make directions how the right to transfer stock to be exercised 453

SECT. PAGE

32. Power to Court to make order appointing new trustees . . 454
33. The new trustees to have the powers of trustees appointed by decree in suit 454
34. Power to Court to vest lands in new trustees . . 454
35. Power to vest right to sue at law in new trustees . . 454
36. Old trustees not to be discharged from liability . . 454
37. Who may apply 454
38. Power to go before the Master in the first instance . . 455
39. Power to petition the Court or the Lord Chancellor . . 455
40. Power to present petition in the first instance . . 455
41. What may be done upon petition 455
42. Court may dismiss petition with or without costs . . 455
43. Power to make an order in a cause . . . 456
44. Orders made by the Court of Chancery founded on certain allegations to be conclusive evidence of the matter contained in such allegations 456
45. Trustees of charities 456
46. No escheat of property held upon trust or mortgage . . 457
47. Act not to prevent escheat or forfeiture of beneficial interest . 457
48. Money of infants and persons of unsound mind to be paid into Court 457
49. Court may make a decree in the absence of a trustee . . 457
50. Powers of the Master 458
51. Costs may be paid out of the estate . . . 458
52. Commission concerning person of unsouud mind . . 458
53. Suit may be directed 458
54. Powers of Court of Chancery to extend to property in the Colonies 459
55. Powers given to Court of Chancery may be exercised by that Court in Ireland 459
56. Powers of Lord Chancellor in lunacy to extend to property in the Colonies 459
57. Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland 459
58. Short title 459
59. Commencement of Act 459
60. Act may be amended, &c. 459

THE TRUSTEE EXTENSION ACT, 1852.

1. Court of Chancery may make an order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale 459
2. Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release . . . 460
3. Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee . . . 460
4. On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer in such person as the Court shall appoint 460
5. On like neglect by executor, similar order may be made . 461
6. Bank of England and Companies to comply with such orders . 461
7. Indemnity to Bank and Companies so obeying . . 461
8. Power to appoint new trustees in lieu of persons convicted of felony 461
9. Power to the Court to appoint new trustees where there is no existing trustee 462
10. Chancellor may make orders for appointment of trustees without it being necessary that it should be made in Chancery, &c. . 462
11. As to powers of persons intrusted with the care of lunatics . 462
12. Act to be construed as part of Trustee Act, 1850 . . 462
13. All orders made under Trustee Act, 1850, or this Act, to be chargeable with the same stamp duty as deeds of conveyance . 462

STATUTES RELATING TO THE MAINTENANCE OR ADVANCEMENT OF INFANTS.

Legacy Duties Act (36 Geo. 3, c. 52).

Sect. Page

32. If by infancy or absence legacies cannot be paid, the money may be paid into the bank and laid out in the £3 per cents. If such money be improperly paid in, the Chancery may dispose thereof. If more than the proper duty has been paid, the Commissioners for stamps may return the excess; and if less, on payment of the full duty, the Chancery may order repayment to the party . 426

Infants, &c., Act (11 Geo 4 & 1 Wm. 4, c. 65).

32. Court of Chancery or Exchequer may order dividends of stock belonging to infants to be applied for maintenance . . 464
35. Costs may be directed to be paid 464
36. Powers given to the Court of Chancery in England . . 464
44. Act to be an indemnity to Bank and other Companies . . 465

Infants Settlement Act (18 & 19 Vict. c. 43).

1. Infants may, with the approbation of the Court of Chancery, make valid settlements, or contracts for settlements, of their real and personal estate upon marriage 465
2. In case infants die under age, appointment, &c., to be void . 465
3. The sanction of the Court of Chancery to be given upon petition . 465
4. Not to apply to males under twenty, or females under seventeen years of age 466

STATUTE RELATING TO PARTNERSHIP.

Law of Partnership Amendment Act, 1865 (28 & 29 Vict. c. 86).

1. The advance of money on contract to receive a share of profits, not to constitute the lender a partner 466
2. The remuneration of agents, &c., by share of profits, not to make them partners 466
3. Certain annuitants not to be deemed partners . . 466
4. Receipt of profits in consideration of sale of goodwill not to make the seller a partner 466
5. In case of bankruptcy, &c., lender not to rank with other creditors 466
6. Interpretation of "person" 467

TABLE OF CASES.

	Page
Abbot, Hobart v.	153
Abingdon Earl of, Bertie v.	187
Abrey, Wood v.	247
Acaster v. Anderson	25
Accumulation Insurance Society, King v.	307
Acey v. Simpson	74
Ackland v. Gravenor	187
Ackroyd v. Smithson	107
Acland v. Gaisford	225
Acton v. Woodgate	105
Adams v. Barry	84
——— v. Blackwall Railway Company	194
——— v. Clifton	125
——— v. Elsey	30
——— v. Rowley	321
——— Sharples v.	177
——— v. Sworder	14, 129
——— v. Weare	213
——— Wedgwood v.	40, 96
Adcock, Sharpe v.	218
Adderley v. Dixon	196
——— Gresley v.	187
Adey v. Arnold	59
Agriculturist Insurance Society, Re	312
Ainslie v. Sims	335
Airey v. Borham	324
Albrecht, Duncuft v.	196, 211
Alcock, Jeudwine v.	223
Alder v. Fouracre	316
Alderson, O'Reilly v.	116
Aldrich v. Cooper	93
Alexander, Crockford v.	229
——— v. Wellington, Duke of	198
Alford, Att. Gen. v.	268
Allen, Bury v.	324
——— Coppard v.	122
——— v. Coster	321
——— v. Kilbre	316
——— Taylor v.	127
Allen's Will, *Re*	269
Aller v. Jones	30
Amer, Davis v.	317
Amery, Hipkins v.	147
Amherst, Earl of, Leeds, Duke of, v.	126
Anderson, Acaster v.	25
Andrews v. Andrews	223
——— Douglas v.	306
——— Fozier v.	135
——— v. Jenny	81
——— v. Lockwood	41
Angelo, *Re*	279
Annesley, Macleod v.	118
——— v. Muggeridge	229, 232
Anon. 2 K. & J. 441	308
——— 6 Madd. 10	117
Anson v. Hodges	228
——— Lord, Winter v.	147
Archbutt, Douglas v.	43
Ardill v. Savage	114
Arkwright v. Stoveld	196
Armistead, Berry v.	260
Armitage v. Askham	231
Armston's Trusts, *Re*	274
Armstrong v. Blake	38
——— v. Storer	67
Arnold, Adey v.	69
——— v. Bainbrigge	160
——— v. Mayor of Gravesend	144
Arrowsmith's Trusts, *Re*	287
Arthur, McNamara v.	253
Arundel v. Holmes	256
——— v. Phipps	196
Ashburner v. Maguire	71
Ashford, Homer v.	217
Ashton v. Dalton	180
Askew, Osbaldiston v.	218
Astle v. Wright	325
Aston, Hood v.	316
Astwell's Will, *Re*	72
Atkins, Hunter v.	249
Atkinson v. Smith	156
Att. Gen. v. Alford	268
——— v. Avon, Portreeve of	113

	Page
Att. Gen. v. Clack	126
——— v. Cornthwaite	53
——— v. Magdalen College	124
——— v. Murdock	136
——— v. Plymouth, Corporation of	248
——— Smallwood v.	241
——— v. Southgate	97
Attwood, Lloyd v.	125
——— Perry, Herrick v.	163
——— Small v.	201, 260
——— v. Small	241
Audland, Ward v.	103
Auldjo, Wallace v.	360
Austin, Lawrence v.	256
——— Stevens v.	219
Austwick, Maddeford v.	214, 236, 245
Avon, Portreeve of, Att. Gen. v.	113
Ayles v. Cox	284
Backhouse, Noad v.	187
Baddely, Jennings v.	310
Bagot v. Bagot	41, 136, 158
Bagshaw v. Winter	360
Bailey v. Ford	310
——— v. Gundry	20
——— Jones v.	144
——— v. Pennington	58
Bainbridge, Hedley v.	306
Bainbrigge Arnold v.	160
——— v. Blair	116, 127, 132
Baker, Holland v.	17
——— Scales v.	110
Baldwin, Echliff v.	229
Ball v. Ball	296
——— v. Coutts	296
——— v Harris	92
Ball's Mortgage Trusts, *Re*	267
Balsh v. Hyham	132
Banfill, Brydges v.	215
Bank of England, Richardson v.	27, 127, 318
Banks v. Gibson	327
——— Witherington v.	333
Banner, Massey v.	118
Bant, Rowe v.	92
Bantock, Hockley v.	143
Barber's Trust, *Re*	273
Barclay, Coventry v.	325, 327
Baring v. Dix	310
——— v. Harris	46
Barker, Kinsman v.	34
——— v. Peile	40, 114, 115, 136
Barker v. Smark	335
——— v. Venables	232
Barkworth v. Young	207
Barnby, Harrison v.	307
Barnes, Brocksopp v.	132
——— v. Robinson	361
Barnett, Duke v.	225
——— v. Weston	177
Barnston, Stackhouse v.	126
Barr v. Jackson	68
Barrett, Davis v.	29
——— Richardson v.	93
Barrington, *Ex parte*	208
——— Sidebottom v.	222
Barrington's Trusts, *Re*	275
Barrows, Hall v.	327
Barrs v. Fewkes	107
Barry, Adams v.	84
Bartlett v. Pickersgill	108
——— v. Salmon	240, 244
——— v. Wood	38
Barton v. Williams	306
Baseley, Huguenin v.	248
Batchelor v. Middleton	182
Bates v. Johnson	176
—— Putnam v.	87
Bath, Corporation of, Sol. Gen. v.	134
Baud v. Fardell	119
Baxendale, Hadley v.	218
Baxter v. West	310
Baxter's Will, *Re*	284
Baylor, Nagle v.	239
Beach, Chapman v.	317
Beardmore v. Gregory	369
Beaufort, Duke of, v. Glynn	229
——— Wellesley v.	296
Beaumont, Clive v.	208
Bevan v. Habgood	163
Beavan v. Oxford, Earl of	144, 177
Becher, Scott v.	127
Beckett, Kendall v.	228
Beckford, Quarrell v.	43
——— v. Tobin	87
Beckley v. Newland	198
Beckwith, Brett v.	304
Bective, Earl of, v. Hodgson	46
Bedford and Cambridge Railway Co. v. Stanley	193
——— Charity, *Re*	334
——— Corporation of, Monkhouse v.	45
Beecher v. Major	109
Beer v. Tapp	133
Bell, Mortimer v.	214
— Vickers v.	46

	Page
Bell, Wright v.	197
Bellaers, Willcox v.	223, 232
Bellamy v. Brickenden	42, 137, 182
——— v. Sabine	260, 261
Benbow, Cook v.	324
——— v. Townsend	108
Bendyshe, *Re*	272
Bennett v. Colley	117
—— Dent v.	248
—— Prevost v.	42
—— Skey v.	58
Benson v. Lamb	215, 228
Bensusan v. Nehemias	40
Bentley v. Craven	112, 322, 324
——— Reade v.	231
Berney v. Sewell	187
Berry v. Armistead	260
Bertie v. Abingdon, Earl of,	187
Betaigh v. Concanen	41
Bethune, Crackelt v.	134
——— v. Kennedy	71
Biddles v. Jackson	296
Bigland, Thorn v.	242
Bigwood, Moxey v.	214
Bill v. Cureton	100
Billing, Ellworthy v.	37
Binfield, Vigraiss v.	127
Bingham v. Bingham	237
Birch, Watson v.	72
Birley v. Kennedy	318
Birmingham and Oxford Ry. Co., Great Western Ry. Co., v.	229
Bishop, Obee v.	84, 123
Blacket, Savile v.	77
Blackwall Ry. Co., Adams v.	194
—— Bainbrigge v.	116, 127, 132
—— v. Bromley	235
—— v. Ormond	58
Blake, Armstrong v.	38
—— Dundas v.	84
—— East India Co. v.	324
—— Hind v.	198
—— Reynolds v.	37
Blakeney v. Dufaur	318
Blanchard v. Cawthorne	187
Blanchard, *Re*	116, 287
Blandford, Willett v.	326
Bletchley, Brice v.	204
Bliss, Vancouver v.	232
Blissett v. Daniel	309
Bloye's Trust, *Re*	269, 273
Blundell v. Winsor	307
Boden, *Re*	282
Bodenham v. Hoskins	251
Boehm, Carter v.	244
——— Raphael v.	131
Boehm, Trafford v.	120
——— v. Wood	230, 262
Bogg, Mason v.	57
Bolder, Wilding v.	101
Bolding v. Lane	180
Bolland, Flight v.	191, 219
Bolton, Lord, Deverell v.	214
Bolton, Faulkner v.	184
——— Saul v.	221
——— v. Puller	322
Bonbonus, *Ex parte*	306
Bond, Clough v.	110
—— v. Kent	146
—— v. Pittard	305
Booth v. Coulton	87
—— Booth v.	335
Borham, Airey v.	324
Borrowman v. Rosser	252
Boswell, Dry v.	305
Bosworth, Stratford v.	194, 231
Boucher, Smith v.	285
Boughton, Knight v.	102
Bourne, Tredwen v.	306
Bowen v. Evans	126
Bowers, Read v.	316
Bown v. Stenson	208
Bowra v. Wright	169, 284
Box, *Re*	275
Boxall, Scorell v.	208
Boyle, Messer v.	144
Boynton v. Richardson	135
Brace v. Duchess of Marlborough	177
Bradley, Cholmer v.	61
Bradshaw, *Ex parte*	282, 283
——— v. Outram	158
——— Salter v.	261
——— White v.	244
Braithwaite, Howard v.	192
Bray, Webster v,	324
Brasse's Trusts, *Re*	282
Braybroke, Lord, v. Inskip	154
Brazier, Lechmere v.	15
Bree v. Holbeck	242
Brett v. Beckwith	304
Brettel v. Williams	306
Brice v. Bletchley	204
—— v. Stokes	121
Brickenden, Bellamy v.	42, 137, 182
Bridge v. Bridge	104
Bridgeman, *Re*	287
Bridger, London and South Western Railway Co. v.	232
Bridges v. Hinxman	63
——— Nelson v.	207
Bright, *Ex parte*	334

	Page
Bright v. Legerton	123
Brignall v. Whitehead	293
Brinkley v. Hann	247
Bristol and Exeter Ry. Co., Parker v.	11
Britten v. Britten	app. 360
Broadmead, Dilkes v.	64
Brocksopp v. Barnes	132
Bromley, Blair v.	235
—— v. Holland	241
Brook v. Brook	101
Brooke v. ——	222
Brookman v. Wenham	11
Broom v. Monk	253
Broughton, Jennings v.	243, 256, 259
Brown v. Brown	95
Brown, Burnell v.	208
—— v. De Tastet	324, 133, 326
—— Devenish v.	222
—— Elliot v.	316
—— Fell v.	150
—— v. Higgs	102
—— v. Kelty	230
—— Lee v.	40
—— v. Lockhart	152
—— Pickford v	97
—— Taylor v.	231
—— v. Temperley	87
—— Torre v.	47
Browne v. Cavendish	105
Brownlow, Lord, Franklin v.	219
Bruce, Warwick v.	191, 219
Bruin v. Knott	138
Bryant, King v.	96
Brydges v. Banfill	215
Buccleugh, Duke of, v. Wakefield	30
Buck v. Lodge	190
—— Vaughan v.	app. 361
Buckeridge v. Whalley	14, 34
Buckland, Rhodes v.	166
Buckle v. Mitchell	217
Buckley, Hill v.	227
Buckley's Trusts, *Re*	267
Buckworth v. Buckworth	300
Bulkley v. Eglinton, Earl of	137
Bull, Pratt v.	144
Bullen v. Sharp	304
Bullock v. Crockett	325
Bunbury, Crisp v.	10
Bunny, Shaw v.	166
Burden v. Burden	324
Burdett v. Hay	15
Burges, Hare v.	219
Burn, Kemp v.	135
Burnand, Nerot v.	45, 308, 321
Burnell v. Brown	208
Burrell v. Delevante	39
Buroughs v. McCreight	124
Burrowes v. Lock	312
Burton, Peacock v.	176
—— Collins v.	46
—— Doe v.	255
Bury v. Allen	324
—— Newport v.	29, 132
Bush, Davis v.	95
Bute's, Marquis of, *Re* Will	281
Butler v. Butler	300
—— v. Freeman	295
—— v. Mulvihill	239
—— Walton v.	320
Buxton v. Lister	196, 213
Byrne v. Norcott	134
Caddick v. Cook	150
Cadman v. Horner	212
Cadwallader, *Doe. dem.*, v. Price	219
Caffrey v. Darbey	134
Calverly v Williams	236
Camac, Flight v.	187
Campbell v. Hooper	191
—— Squire v.	212
Campion, Lawton v.	237
Camroux, Molton v.	191
Canham v. Neale	97
Carew, Paynter v.	166
Carew, *Re*	238
Carlisle, R. v.	12
Carmichael, Hudson v.	151, 224
—— v. Hughes	301
Carpenter, *Re*	279
—— Tebbs v.	131
Carter v. Boehm	244
—— v. Carter	164, 176
—— v. Dean of Ely	192, 215
—— Swinburne v.	336
—— v. Taggart	360
Carter's Trusts, *Re*	135
Cartwright, Cooper v.	227
Cash, Hodson v.	136
Cater's Trusts, *Re*	272
Cates v. Knight	10
Cator, Gilchrist v.	361
Cautley, Foster v.	271
Caurtois's Trusts, *Re*	270
Cavendish, Browne v.	105
—— v Mercer	300
Cawthorne, Blanchard v.	187
—— v. Chalie	314
—— *Re*	273

	Page
zneau's Legacy -	- 270
adwick v. Heatley -	- 125
allis, Rogers v. -	- 207
ambers, Gaskell v.	- 112
—— v. Goldwin 132, 152,	302
ampernown, Townsend v.	- 222
ampneys, Sturgis v.	app. 361
apman, Brach v. -	- 317
—— v. Chapman	- 143
appell v. Davidson	- 30
—— v. Purday	41, 198
ard Railway Co., Fripp v.	- 188
arlesworth v. Wilkinson,	app. 361
arlton v. Poulter -	- 316
aters, Lynn v. -	- 197
ester, Rolf v. -	- 177
esterfield, Lord, Ford v.	- 42
esterfield, Earl of, v. Janssen	240, 251
ichester, Smith v.	153, 228
ild v. Elsworth -	- 73
innock v. Galsworthy	- 209
ippendale, *Ex parte*	131, 132
issum v. Dewes -	- 95
olmeley, Cockerell v.	- 257
olmer v. Bradley -	- 61
ristian v. Clarke -	- 54
—— v. Foster	- 96
risty v. Courtney -	- 90
urchill, Shepherd v.	- 282
urton v. Douglas	198, 317
ack, Attorney General v.	- 126
amp, Lechmere v. -	- 185
anricarde, Lord, v. Hening -	123, 261
aringbould v. Curtes	. 198
—— v. Clarke	- 54
arke, Dawson v. -	- 107
—— v. Dickson -	- 258
—— *Ex parte* -	- 145
—— v. Faux -	- 255
—— Fullager v. -	- 260
—— Hedges v. -	- 361
—— v. Leach -	- 309
—— v. Mackintosh	- 214
—— v. Malpas	- 256
—— v. Moore -	- 212
—— v. Ormond, Lord	- 91
—— v. Sewell	- 87
—— v. Wilson -	- 230
avering v. Clavering	- 196
axton, Smith v. -	- 107
ayton's Case	- 111
—— v. Illingworth	- 196
—— Pollard v. -	- 196
agworth, Cooke v.	- 239

	Page
Clendon, Stokes v. -	- 150
Clegg, Pare v.	15, 28
Clifford v. Turrell	- 198
Clifton, Adams v.	- 125
Clinan v. Cook -	- 228
Clinton v. Hooper -	- 151
—— Palk v. -	- 150
Clive v. Beaumont -	- 208
—— v. Clive -	- 86
Clough v. Bond -	- 110
Clowes v. Higginson -	211, 212
—— Higginson v. -	191, 212
Clutton, *Ex parte* -	- 101
Cock v. Dickson -	- 251
Cockburn v. Peel -	- 120
Cocker, Loyd v. -	- 302
Cockerell v. Cholmeley	- 257
Cockell, Nickesson v.	- 94
Cocking v. Pratt -	- 248
Cogan v. Stevens -	- 107
Coghill, Holmes v. -	- 81
Cohen, Onions v. -	233, 254
Colchester, Mayor of, Lowton v.	41
Cole v. Gibbons -	- 251
—— v. Gibson -	- 257
—— v. Moore -	- 116
—— v. Muddle -	- 122
Coleman v. Winch -	- 177
Coles, Leaf v. -	- 328
—— v. Trecothick -	- 210
Collard v. Roe -	- 280
Collett v. Hover -	- 201
—— Thrupp v. -	- 74
—— v. Wright -	- 192
Colley, Bennett v. -	- 117
Collier v. Dudley -	- 136
Collingridge, Cook v. -	- 326
Collins v. Burton -	- 46
—— Crawshay v, -	225, 326
—— v. Jackson -	323, 329
—— Wetherell v. -	- 184
Collyer v. Fullom -	- 216
Colman v. Eastern Counties Railway Company	- 193
Colson's Trusts, *Re*	- 271
Colt v. Wollaston -	- 235
Comerford, Lucas v. -	- 216
Concanen, Betagh v. -	- 41
Coningsby, Eastwick v.	- 317
Connor v. Menzies -	- 41
Conybeare, New Brunswick Railway Company v.	256, 261
—— v. New Brunswick Railway Company	- 242
Cood v. Pollard -	- 146
Cook v. Benbow -	- 324

	Page
Cook, Caddick v.	150
—— v. Collingridge	326
—— v. Gregson	90
—— v. Hutchinson	107
—— Jeans v.	108
—— v. Macpherson	16
—— Stevens v.	324
Cooke v. Clayworth	259
—— Clenan v.	223
Cooper, Aldrich v.	93
—— v. Cartwright	227
—— Davies v.	246, 250, 261
—— v. Jones	284
—— Norton v.	41
—— v. Pilcher	96
Cope, Dakin v.	226
—— v. Parry	201
Copeland, Toulmin v.	318, 326
Coppard v. Allen	122
Cordell v. Elliott	361
Corles, Dipple v.	104
Corser v. Corser	126
Cory v. Cory	239
Coslake v. Till	215
Coster, Allen v.	301
Costerdine v. Costerdine	121
Costigan v. Hastiler	
Cottam v. Eastern Counties Railway Company	306
Cottee, Knott v.	138
Coulson's Trust, *Re*	136, 268, 271
Coulton, Booth v.	87
Course v. Humphrey	116
Courtney, Christy v.	90
—— v. Williams	73
Coutts, Ball v.	296
Coventry v. Barclay	325, 327
Cowell, Dickens v.	150
Cox, Ayles v.	284
—— v. Cox	267
—— v. Hickman	304
Crackelt v. Bethune	134
Cracker, Durham v.	app. 361
Cracroft, Davies v.	89
Cradock v. Piper	93
Craig, Fenn v.	241
—— v. Fords	324
—— Millar v.	24, 324
Cragg v. Holme	239
Crallan v. Oulton	83
Cramer v. Cramer	283
Craven, Bentley v.	112, 322, 324
Crawshay v. Collins	326, 325
—— v. Maule	327, 329, 308
Crearson v. Robinson	55
Creed, Defries v.	29
Cresswell v. Dewell	57
Crisp v. Bunbury	10
Croall, McVeagh v.	23, 36
Crockett, Bullock v.	325
Crockford v. Alexander	229
Croft, Day v.	274
Crofts v. Middleton	191
Croll, Hills v.	216
Crompton v. Huber	224
Crosby v. Fooke	219
Cross v. Kennington	96
Croydon v. Riley 156, 157, app.	362
Cud v. Rutter	196
Cuddon, White v.	217
Cullingford, Westcott v.	41
Cullingworth v. Loyd	39, 250
Cumberledge v. Lawson	238
Cummings v. Cummings	92
Cunningham, Warner v.	310
Cureton, Bill v.	100
Curling, England v.	236
Curlings v. Flight	220
Currant v. Jago	109
Curtis, Claringbould v.	198
—— Hogue v.	335
Cutler, *Re*	app. 360, 361
—— v. Simmonds	230
Cutts v. Salmon	248, 259, 261
Dacie v. Jones	318
Dady v. Hartridge	54
Dakin v. Cope	226
Dalgleish v. Jarire	16
Dalton, Ashton v.	180
—— *Re*	269
Dance, Ebrard v.	109
Dancer, Tanner v.	96
Daniel, Blissett v.	309
—— Faulkner v.	158
—— Talmer v.	84
Darby, Caffrey v.	134
—— Harbin v.	132
—— v. Whittaker	195
Dare, Greenslader v.	229, 262
Dartmouth, Earl of, Howe v.	119, 120
Davey v. Durrant	165
—— Millett v.	333
Davies v. Bush	95
—— v. Cooper	261, 246, 250
—— v. Cracroft	89
—— v. Otley	107
—— Tittley v.	179
Davis v. Amer	317

	Page
Davis v. Barrett	29
—— v. Dendy	132
—— *Ex parte*	116
—— Husband v.	307
—— Scott v.	248
Dawe v. Reed	116
Dawler, Foster v.	113
Dawson v. Clarke	107
—— v. Keaton	90
—— Stocken v.	133, 324
Dawson's Trusts, *Re*	267
Day v. Croft	274
—— Hawkins v.	59
—— v. Newman	236, 247
Deacon, Foster v.	227
Dean, James v.	111
—— Rastron	246
De Beauvoir, Owen v.	124
De Beranger v. Hanmer	310
De Bernales, Moons v.	131
De Blaquiere, Knight v.	20
De Costa v. Sandrett	244
De Este v. Gibson	245, 261
Deffell, Pennell v.	110
Defries v. Cread	29
De Lambert, Lake v.	101
Delevante, Burrell v.	39
Deller v. Simonds	231
De Manneville v. De Manneville	296
Dendy, Davis v.	132
Dent v. Bennett	248
Denton v. Donner	248, 259
—— v. Manners	74
Dering, Thomas v. 199, 200, 213, 252	
—— v. Winchelsea	323
Desborough, Lindenau v.	244
De Tastet, Brown v. 133, 324, 226	
Devenish v. Brown	222
Deverell v. Bolton, Lord	214
Devoy v. Devoy	109
Dewell, Cresswell v.	57
—— v. Tuffnell	37
Dewes v. Chissum	95
Dibbs v. Goring	95
Dickenson, Owens v.	91
—— v. Teesdale	84
Dighton, Lane v.	110
Dilkes v. Broadmead	64
Dillon v. Mulvaney	111
Dillwyn v. Llwellyn	103
Dimes v. Scott	87
Dipple, Corles v.	104
Dix, Baring v.	310
Dixon, Adderley v.	196
—— Clarke v.	258

	Page
Dixon v. Gayfere	146
Dodswell, Middleton v.	127
Doe v. Burton	255
Doloret v. Rothschild	215
Donald, Foster v.	318
Donaldson v. Donaldson	104
Donner, Denton v.	248, 259
Donovan v. Fricker	261
Douglas v. Andrews	301
—— v. Archbutt	43
—— Churton v.	198, 317
—— v. London and North Western Ry. Co.	255
Dowle v. Sanderson	163
Downe, Viscount, v. Morris	158
Downes, Gardiner v.	136
—— Wood v.	216
Dowson, Pickering v.	236
Draper, *Re*	275
Drayson v. Pocock	126
Drew v. Drew	314, 315
—— v. Power	14
Drewry v. Thacker	97
Dry v. Boswell	109
Dudley, Collier v.	136
Dufaur, Blakeney v.	318
Duffield v. Elwes	153
Duke v. Barnett	225
Dummer v. Pitcher	109
Duncombe v. Hanley	158
Duncuft v. Albrecht	196, 211
Dundas v. Blake	84
Dunovan v. Fricker	258
Durham v. Crackle	app. 361
—— Earl of, v. Legard	200, 213, 231
Durrant, Davy v.	165
Dyer v. Dyer	108
—— v. Hargrave	216, 227, 244, 257
—— Price v.	212
Dyson v. Hornby	226
Eage, Soames v.	207
Early v. Garrett	242
East Anglian Railway Company v. Russell	29
Eastern Counties Railway Company, Coleman v.	193
East India Company v. Blake	324
—— v. Cottam	306
—— v. Henchman	111
——, Wych v.	124
Eaves v. Hickson	118
Eastwick v. Coningsby	317

	Page
Ebrand v. Dancer	109
Echliff v. Baldwin	228
Edmonds, Evans v.	214
Edwards, Gervais v.	216
——— v. Grand Junction Railway Company	192
——— v. Harvey	232
——— v McLeay 242, 245, 255,	261
——— Matthie v. 164,	332
——— v. Wickwar	214
——— Williams v.	228
Egerton v. Jones	223
Eglin v. Sanderson	135
Eglinton, Earl of, Bulkeley v.	137
Egremont, Lee v.	73
Electric Telegraph Company of Ireland, *In re*	310
Elibank v. Montelieu	359
——— Lord, Murray v. 127,	359
Eliot, Middleton Lord v.	184
Elliott v. Cordell	361
—— v. Brown	316
Ellis v. Grey, Earl	216
Ellis's Settlement, *Re*	284
Ellison's Trust	113
Ellison v. Wright	183
Elmes, Hunt v.	163
Elph, Stacey v.	112
Elsey v. Adams	30
Elsworth. Childs v.	73
Elvy v. Norwood	178
Ely, Bishop of, Pickering v.	216
——— Dean of, Carter v. 192,	215
Elwes, Duffield v.	153
——— Tassell v.	122
England v. Curling	236
English and Irish Church and University Assurance Society	304
Equitable Reversionary Society, Falkner v.	165
Erskine's Trusts, *In re*	360
Esdaile v. Stephenson 222, 224,	226
Espin v. Pemberton	163
Essell v. Hayward	308
Etches, Smith v. 20, 149,	369
Ettrick, Uvedaile v.	116
Evans, Bower v.	126
——— v. Edmonds	214
——— v. Jackson	252
——— v. Massey	300
——— Rowland v.	34
——— Siggers v.	105
——— v. Tweedie	83
Everett, *Re*	260
Everett v. Prythergch	127
——— Smith v.	326
Eyre v. Hanson	184
—— Millard v.	116
Fairburn v. Pearson	317
Fairlie, Freeman v. 27,	316
Faithorne v. Weston	311
Falcke v. Gray	246
Fardell, Baud v.	119
Farebrother v. Welchman	252
——— v. Woodhouse	179
Farquhar, McQueen v.	231
Farrant v. Lovell	333
Farrell, Jones v.	138
Faulkner v. Bolton	184
——— v. Daniel 84,	158
——— v. Equitable Reversionary Society	165
Faux, Clarke v.	255
Fawcett v. Whitehouse	324
Fawkner v. Watts	305
Fearnhead, Knatchbull v.	60
Featherstonhaugh v. Fenwick 308,	323
Feeney, Mansell v.	23
Fielding, Goodwin v.	252
Feistel v. King's College	188
Fell v. Brown	
Fellows' Settlement, *Re*	293
Fenn, Craig v.	241
Fenner v. Taylor	360
Fenwick, Featherstonhaugh v. 308,	323
Ferney, Young v. 19,	44
Fernie, Rees v.	259
Ferris v. Mullins	143
Fewster v. Ledmer	231
Fieldon v. Laver	40
Filer. Weston v.	284
Finch v. Finch	108
—— Thornton v. 91,	145
Finley v. Howard	116
Firth v. Greenwood	231
Fish v. Klein	101
Fitzpatrick v. Mahoney	34
Fleming's Case	145
Fletcher v. Fletcher 103,	117
Flight v. Bolland 191,	219
—— v. Camac	187
—— Curling v. 219,	220
—— v. Gray	252
Flint v. Woodin	257
Flintof v. Haynes	97
Flitcroft, *Re*	284

	Page
lower v. Walker	221
Tureau v. Thornhill	196, 253
ogo, Simpson v.	26, 160
ooks v. Barrs	107
oley v. Hill	315
—— v. Millardet	32
oligno v. Martin	253
oljamb v. Ogilvie	210
—— White v.	232
—— v. Willougbby	300
orbes v. Lamwood	106
—— v. Ross	130
—— Stewart v.	45
ord, Bailey v.	310
—— v. Chesterfield, Lord	42
—— v. Wastell	144
ordham v. Wallis	66
ords, Cragg v.	324
orrer v. Nash	222
orshaw v. Higginson	136
orster v. Hale	101, 320
oster v. Causley	271
—— Christian v.	96
—— v. Dawber	113
—— v. Deacon	227
—— v. Donald	318
—— Hewitt v.	135
orteath, Rumbold v.	43
orteblow v. Shirley	227
ouracre, Alder v.	316
ox, Hope v.	74, app. 369
oxall, Jones v.	131
oy, Way v.	45
ozier v Andrews	135
ancome v. Fancome	30
ranklin v. Brownlow, Lord	219
—— v. Mutless	109
rankum v. Gaston	191
razer v. Kershaw	316
reeman, Butler v.	295
—— v. Fairlie	27, 326
reeman v. Malins	194
reer v. Hesse	232
reere v. Moore	177
rench v. Mascall	190
—— v. Styring	305
ricker, Donovan v.	261, 258
ripp v. Chard Railway Company	188
risley, Ravenscroft v.	84
rost v. Moulton	308
ry, Hamilton v.	114
ullager v. Clarke	260
uller, Mucklow v.	112
—— v. Redman	88
ullom, Collyer v.	216

	Page
Fulton v. Gilmore	135
—— Lowry v.	55
Furze v. Hemmett	97
Fussell v. Elwin	122
Futvoye, Kennard v.	175
Fyson v. Malden	218, 233
Gaby, Stump v.	248, 260
Gale v. Lindo	250
Galloway, Lord, Steadman v.	253
Galsworthy, Chinnock v.	209
Galton, Mallack v.	161
Gardiner v. Downes	136
—— — Gurnell v.	141
—— v. McCutcheon	322
Gardner v. Marshall,	43, app. 360
—— v. Rowe	100
Garland v. Garland	29
—— Smith v.	217
Garrett, Early v.	242
Garrick's Case	241
Gasford, Acland v.	225
Gaskell, v. Chambers	112
Gaston v. Frankum	191
Gathercole, Hawkins v.	144, 188, 216
Gatty, Phillipson v.	120
Gaunt v. Taylor	136
Gayfere, Dixon v.	146
Gearey v. Morton	39
Geddes v. Wallace	305
Gedye v. Malson	150
Gee v. Pearse	228
Geering, Wetherell v.	219
Geldard v. Hornby	185
Geldart, Robinson v.	94
Gent v. Harris	app. 360
George v. Milbank	81
Gervais v. Edwards	216
Gibbons, Cole v.	251
Giblett, Hersey v.	195
Gibson, Banks v.	327
—— Cole v.	257
—— v. D'Este	245, 261
—— Grigg v.	app. 362
—— v. Jeyes	248, 249
—— Lake v.	109
—— v. Nichol	42
—— v. Seagrim	179
—— v. Smith	15
—— Wilde v.	245
Giddings v. Giddings	111, 129
Giffard, Staines v.	271
Gilbert v. ——	104
Gilchrist v. Cator	App. 361

	Page
Gilbert, Hamley v.	300
Gillett v. Peppercorn	111
Gilmour, Fulton v.	135
Glassington v. Thwaites	87
Gleaves v. Paine	app. 361
Glover, Harding v.	317
Glyn, Harding v.	102
Glynn, Beaufort, Duke of v.	229
—— Spurway v.	87
Goddard v. Snow	250
Godfrey, Stone v.	212
Godlee, Head v.	107
Goldwin, Chambers v.	132, 152, 302
Gompertz v. Pooley	252
Good v. West	15
Goodchild v. Terrett	63
Goodman v. Grierson	142
——— v. Whitcombe	310
Goodwin v. Fielding	252
Goodyer, Murrell v.	214
Gore, Lefroy v.	323
Goren, Dibbs v.	95
Gould v. Kemp	212
Gossip v. Wright	161
Gowring v. Mowbray	42
Grabham, Harvey v.	209
Graham, Stewart v.	230
Grand Junction Railway Company, Edwards v.	192
Grant v. Grant	101, 116
—— Routledge v.	209
—— Wynch v.	59
Granvile, Hilton v.	16
Gratwick's Trusts, *Re*	269
Gravenor, Ackland v.	187
Gravesend, Mayor of, Arnold v.	144
Gray, Earl of, Ellis v.	216
——— Falcke v.	246
——— Flight v.	252
Great Northern Railway Company, Lindsey v.	192
Great Western Railway Company v. Birmingham and Oxford Railway Company	229
Greatwood, Jones v.	142
Greaves v. Wilson	221
——— *Ex parte*	130
Green, *Ex parte*	301
——— v. Monk	223
——— v. Pulsford	218
——— v. Wood	238
——— Trusts, *Re*	276
Greenbank, Hearle v.	101
Greenough v. Shorrock	151
Greenslade v. Dare	229, 262
Greenwell v. Greenwell	299
——— Greenwell v.	299
Greenwood, Firth v.	231
——— Simpson v.	326
——— v. Wakeford	114
——— Wilson v.	317, 318
Greesley, Woodyatt v.	122
Gregory, Beardman v.	app. 369
——— Rolfe v.	124, 131
Gregson v. Cook	90
Gresley v. Adderley	187
——— v. Mousley	248
Grey v. Grey	108, 109
—— Ward v.	70
Grierson, Goodman v.	142
Griffiths v. Spratley	246
——— Twistleton v.	251
——— v. Young	210
Grigg v. Gibson	app. 362
Grogan v. Lethbridge	45
Groom, Wilks v.	280
Groome, Parson v.	336
Grover v. Hugell	253
Groves v. Levi	62
Guedella, Mendes v.	121
Guest v. Homfray	231
Gundry, Bailey v.	20
Gunn, Hooper v.	36
Gunter v. Halsey	210
Guppy, Stevens v.	208
Gurnell v. Gardiner	141
Gutteridge, Phillips v.	178
Habgood, Beavan v.	163
Hadland's Settlement, *Re*	273
Hadley v. Baxendale	218
Hale, Foster v.	100, 320
—— v. Hale	317, 325
—— v. Hallett	61
Hales, Hethersell v.	132
Hall v. Barrows	327
—— v. Jenkinson	230, 262
—— v. Laver	137
—— v. Macdonald	94
—— v. Warren	191
Hallett, Hall v.	61
Hall's Policy, *Re*	267
Halsey, Gunter v.	210
Hamilton v. Fry	114
——— v. Littlejohn	46
Hamlet, King v.	251, 258
Hamley v. Gilbert	300
Hammel, De Beranger v.	310
Hamond v. Walker	27
Hampton v. Spencer	100

	Page
anbury, Parkinson v.	165
ancox v. Spittle	282
and, Vickers v.	226
ansford, *Re*	271
ansley, Duncombe v.	158
anson, Eyre v.	184
—— v. Keating	app. 361
—— Mills v.	318
arbin v. Darby	132
arding v. Glyn	102
—— v. Glover	317
ardisty, Wood v.	59
are v. Burges	219
— *Ex parte*	321
— Haynes v.	236
— London and North Western Railway Company	17
arford, Worrall v.	131, 136
argrave v. Dyer	244, 257
—— Dyer v.	216, 227
arkness, Pillans, v.	312
arley, Pannell v.	251
arrington, Bruce v.	58
arris, Ball v.	92
—— Baring v.	46
—— Gent v.	app. 360
—— v. Harris	116
—— Tipping v.	184
arris's Trust, *Re*	269
arrison v. Barnby	307
—— v. Harrison	120
—— Smith v.	237
—— v. Stewardson	17
—— v. Tennant	310, 311
art v. Montefiore	36
artley, Ponsford v.	53, 63
artnall's Trusts, *Re*	283
artridge, Dady v.	54
arvey, Edwards v.	232
—— v. Grabham	209
—— v. Harvey	135
—— Osborne v.	230
—— v. Palmer	77
—— *Re*	287
—— Turner v.	245, 252, 261
arewood, Rankin v.	58, 97
aseltine, Simmons v.	219
assell v. Hawkins	73
astings v. Hone	76
astler, Costigan v.	238
athorne v. Russell	127
avelock's Trusts, *Re*	293
awk, Langley v.	127
awke, Stronge v.	95
awkes, *Re*	270
awkins v. Day	59

	Page
Hawkins v. Gathercole	144, 188, 216
—— Hassell v.	73
—— v. Parsons	330
Hawkshaw v. Parkins	306
Hay, Burdett v.	15
Haynes, Flintoff v.	97
—— v. Hare	236
—— v. Haynes	194
Hayward, Essell v.	308
—— v. Parsons	308
Haywood, Hide v.	134
Head v. Godlee	107
Headington's Trusts, *Re*	272
Heap, Schofield v.	73
Hearle v. Greenbank	101
Hearn, Woollam v.	231
Heath v. Sanson	308
—— v. Weston	70
Heathcote, Martin v.	314
—— v. Paignon	246, 247
Heatley, Chadwick v.	125
Hedley v. Bainbridge	306
Hedges v. Clark	app. 361
Hellely, Johnson v.	327
Helme v. Smith	306
Hemming's Trusts, *In re*	135, 271
Henchman v. East India Company	111
Henderson v. McIver	132
—— v. Wild	306
Hennett, Furze v.	97
Henning, Clanricarde v.	261
Herbert's Case	296
Hereford v. Ravenhill	107
Heron, Lightfoot v.	202
—— Stokes v.	46
Hersey v. Giblett	195
Hertford, Borough of, v. Poor of Hertford	134
Hesse, Freer v.	232
Hethersell v. Hales	132
Hewett v. Foster	135
Hewitt, Pearse v.	325
Heysham v. Heysham	301
Hichins, Sutton Harbour Railway Company v.	41
Hickman, Cox v.	304
Hicks, Lovell v.	242
Hickson, Elwes, v.	118
Hide v. Haywood	134
Highfield, Peake v.	335
Higgins v. Senior	192
Higginson v. Clowes	191, 212
—— Clowes v.	211
—— Forshaw v.	136

	Page
Higgs, Brown v.	102
—— Lukey v.	206
Hill v. Buckley	227
Hill, Foley v.	314
Hill v. Hill	87
—— Maling v.	232
—— Warburton v.	268
Hillacre, White v.	179
Hillas, Wild v.	252
Hills v. Croll	216
Hilman, Lewis v.	269, 271
Hilton v. Granville, Lord	16
Hinckman, Smith v.	250
Hindé v. Blake	198
—— v. Whitmore	362
Hinds, *Ex parte*	320
Hening, Clanricarde v.	123
Hinman, Bridges v.	63
Hinton v. Hinton	99, 247
Hipkins v. Amery	147
Hirtzel, *Ex parte*	143
Hoare, Steward v.	132
Hobart v. Abbot	153
Hobson, Rist v.	207
—— Stansfield v.	152
Hockley v. Bantock	143
Hodges, Anson v.	228
—— Moggs v.	94
Hodges's Settlement, *Re*	205
Hodgson, Bective, Earl of, v.	46
—— Thompson v.	153
Hodson v. Cash	136
Hodgson's Settlement, *Re*	286
Hogg, Wilkinson v.	119, 121
Hoggart v. Scott	222
Hogue v. Curtis	335
Holbech, Bree v.	242
Holbrook, Spackman v.	95
Holgate v. Jennings	119
—— v. Nelthorpe	192, 241
Holland v. Baker	17
—— Bromley v.	241
—— King v.	101
Holme, Cragg v.	239
Holmes v. Ashford	217
—— v. Coghill	81
Homer, Sanders v.	283
Homfray, Guest v.	231
Hone, Hastings v.	76
Hood v. Aston	316
—— v. Oglander	40, 212, 233
Hooper, Campbell v.	191
—— Clinton v.	151
—— *Ex parte*	176
—— v. Gunn	36
—— *Re*	275
Hooper, Sandon v.	182, 183
—— v. Strutton	280
Hope v. Fox	369
—— Fox v.	74
—— v. Hope	216
Hopkinson v. Rolt	176
—— Wade, v.	296
Hopwood v. Hopwood	73
Horlock v. Smith	183
Hornby v. Dyson	226
—— Geldard v.	185
Horner, Cadman v.	214
Hoskin v. Simcock	183
Hoskins, Bodenham v.	241
—— *Re*	292
Hotham, Stevens v.	219
Hover, Collett v.	201
Howard v. Braithwaite	192
—— Finlay v.	116
—— v. Rhodes	114
Howarth, Shuttleworth v.	116
Howden, Simpson v.	235, 255, 256
Howe v. Dartmouth, Earl of	119, 120
—— v. Hunt	207
—— Whitaker v.	317
Howell, Tardrew v.	47
Howland v. Morris	226
Huber, Crompton v.	224
Hudson v. Carmichael	151, 224
Hue's Estate, *Re*	273
Huguenin v. Baseley	248
Hughes, Carmichael v.	301
—— v. Hughes	300
—— v. Key	115, 136
—— v. Science	295, 296
—— v. Wynne,	83
Hugman, *In re*	116
Hulme v. Hulme	116
Humfrey, Course v.	136
Hunt v. Elmes	163
—— Howe v.	207
Huth, Ormerod v.	215
Hunter v. Atkins	249
—— Law v.	32
Huntingdon v. Huntingdon	151
Hurley, Pannell v.	122
Husband v. Davis	307
Hutchinson, Cook v.	107
Hyde, Watts v.	21, 115
Hyham, Balsh v.	132
Hymers v. Official Manager of Newcastle Banking Company	55
Isaac, *Re*	334

	Page
obetson, Rhodes v.	195
lingworth, Clayton v.	196
nderwick, Moxhy v.	206
ngilly, Walburn v.	307
nnes, Jackson v.	155
nskip, Lord Braybroke v.	154
rby v. Irby	178
rvine, Tanfield v.	31
rving, Maitland v.	248
zod v. Izand	102
ackson Barr v.	68
—— Biddles v.	296
—— Collins v.	323, 329
—— Evans v.	252
—— v. Innes	155
—— v. Jackson	195, 329
—— v. Leaf	97
—— Maddox v.	18
—— v. Petre	230
—— Sinclair v.	178
—— v. Whitehead	114
acob v. Lucas	119
—— v. Richar	25
acobs v. Richards	191
ago, Currant v.	109
ames v. Dean	111
—— v. Lucas	210
—— v. Morgan	246
—— Simmonds v.	195
anssen, Chesterfield, Earl of, v.	240, 251
arvie, Dalgleish v.	16
arvis v. White	318
eakes v. White	219
eans v. Cook	108
ennay v. Andrews	81
enkins v. Jones	165, 166, 332
—— Macfadden v.	99
—— Richardson v.	92
—— Trust, *Re*	272
enkinson, Hall v.	230, 262
ennings v. Baddeley	310
—— v. Broughton	243, 256, 259, 312
—— v. Holgate	119
enour v. Jenour	41
ernagan, Willis v.	238
ervoise v. Northumberland, Duke of	218
eudwine v. Alcock	223
ewson v. Moulson	359
eyes, Gibson v.	248
—— Smith v.	317
ohnes, Lloyd v.	17
Jones, Allen v.	30
—— v. Bailey	144
—— Cooper v.	284
—— Dacie v.	318
—— Egerton v.	223
—— v. Farrell	138
—— v. Foxall	131
—— v. Greatwood	142
—— Jenkins v.	165, 166, 332
—— v. Kearney	206
—— v. Lewis	118
—— v. Lock	99, 100, 104
—— New v.	132
—— v. Ricketts	39
—— Sainsbury v.	207, 255
—— Thomas v.	96
—— v. Welsh	311, 331
—— v. Wellbeloved	74
—— West v.	242
Johnson, Bates v.	176
—— v. Helleley	327
—— v. Legard	202
—— v. Medlicott	239
—— v. Telford	131
—— v. Woods	94
Johnstone, Kay v.	296, 305
Joynes v. Statham	212
Kay v. Johnstone	296, 305
—— v. Smith	125
Kealon, Dawson v.	90
Kearney v. Jones	206
Keating v. Hanson	361
Kebble, *Ex parte*	229
Keeler, *Re*	281
Keen, Mellersh v.	308, 324
Kekewich v. Manning	104
Kelty, Brown v.	230
Kemp v. Burn	135
—— Gould v.	212
—— v. Mackerell	41
Kemshead, Talbot v.	42
Kendall v. Beckett	228
—— v. Masters	43, 111
Kennard v. Futvoye	175
Kennedy, Birley v.	318
—— v. Lee	194
Kennegal, Reech v.	134, 135
Kennington, Cross v.	96
Kensington, *Ex parte*	143
Kent, Bond v.	146
—— v. Padget	178
Kershaw, Fraser v.	316
Key, Hughes v.	115, 136
Keys v. Williams	143

	Page
Kien v. Stukeley	238
Kilbre, Allen v.	316
Kime v. Welfitt	302
Kincaid's Trusts, *In re*	app. 360
King v. Accumulative Insurance Company	307
—— v. Bryant	96
—— v. Hamlet	251, 258
—— v. Holland	101
—— v. King	255
—— v. Mullins	125
—— v. Phillips	112
—— *Re*	334
—— v. Savey	258
—— v. Smith	333
Kingdom, Lyse v.	135
King's College, Feistal v.	188
Kingsford v. Swinford	252
Kingsley v. Young	198
Kinnoul, Earl of, v. Money	151
Kinsman v. Barker	34
Kirby, Webb v.	228
Kirkwood v. Thompson	166
Klein, Fish v.	101
Knapp v. Mickelson	229
Knatchbull v. Fearnhead	60
—— —— v. Boughton	102
—— —— Cates v.	10
—— —— v. Knight	102
Knight's Trusts	272
Knight v. De Blaquiere	20
Knott, Bruin v.	138
—— v. Cottee	138
—— *Ex parte*	177
Kuffin, Roberts v.	35
Lake v. De Lambert	101
—— v. Gibson	109
Lamb, Benson v.	215, 228
Lambert, Wood v.	223
Lancashire v. Lancashire	135
Laud, Waugh v.	150
Lane, Bolding v.	180
—— v. Dighton	110
—— Lowndes v.	214
—— v. Newdegate	216
—— Searle v.	59
Lane's Trusts, *Re*	272
Langley v. Hawk	127
—— Ramsden v.	131, 183
Langslake, Scott v.	241
Latouche, Swinbourne v.	336
Langham v. Sandford	107
Laver, Fielder v.	40
Laver, Hall v.	137
Law v. Hunter	32
—— *Re*	47
Lawford v. Partridge	334
Laurence v. Austen	256
Laws v. Rand	306
Lawson v. Comberledge	238
Lawton v. Campion	237
Lea, *Re*	282
Leach, Clark v.	307
Leaf v. Coles	329
—— Jackson v.	97
Leake's Will, *Re*	272, 273
Lechmere v. Brazier	15
—— v. Clamp	185
Lee v. Brown	40
—— v. Egremont	73
—— Kennedy v.	194
—— Wythes v.	147, 256, 261
Leeds, Duke of, v. Amherst, Earl of	126
Lefroy v. Gore	323
Legard, Durham, Earl of, v.	200, 213, 231
—— Johnson v.	202
Legerton, Bright v.	123
Legg v. Mackerel	114, 137
Lenan, Minet v.	218
Le Texier v. Margravine of Anspach	313
Lethbridge, Gwynn v.	45
Lett, Stahlschmidt v.	95
Letts and Steare, *Ex parte*	324
Levett's Trusts, *Re*	270
Levi, Groves v.	62
Levy v. Lindo	205
Lewis v. Hillman	269, 271
—— Jones v.	118
—— v. Loxham	222
—— v. Poole	149
Ley, Price v.	237
Life Assurance Society of Scotland v. Siddall	113
Lindenau v. Desborough	244
Lindo, Gale v.	250
—— Levy v.	205
Light v. Light	362
Lightfoot, Heron v.	202
Lemood, Forbes v.	106
Linsey v. Great Northern Railway Company	192
Lister, Buxton v.	196, 213
—— v. Pickford	123
—— Tidd v.	127, 361
Littlejohn, Hamilton v.	46
Livesey v. Livesey	300

	Page
erpool, Manchester and New	
astle Railway Company,	
Preston v - -	- 193
ewellyn, Dillwyn v.	- 103
—— v. Mackworth	- 124
yd v. Attwood -	- 125
— v. Cocker -	- 302
— Cullingworth v.	39, 250
— v. Johnes -	- 17
ck, Burrowes v. -	- 312
— Jones v. -	99, 100
ckhart, Bruin v. -	- 152
ckie, Robertson v. -	- 308
ckwood v. Andrews -	- 41
—— Scholfield v.	151, 274
dge, Buck v. -	- 190
mas v. Wright -	- 94
ndesborough v. Somerville	86
ndon and Birmingham Rail-	
way Company v. Winter	- 212
ndon and North Western	
Railway Company, Douglas	
v. - - -	- 255
—— —— Hare v. -	17
ndon and South Western	
Railway Company v. Bridge	232
nsdale, Prideaux v.	250, 313
rens, *Re* - -	- 275
vegrove, *Ex parte* -	- 131
—— Parr v.	220, 222
vel, Farrant v. -	- 333
vell v. Hicks -	- 242
water, Robinson v. -	- 280
wndes v. Lane -	- 214
wry v. Fulton -	- 55
wton v. Mayor of Colchester	41
xham, Lewis v. -	- 222
ican, Earl of, v. Latouche	- 336
icas v. Comerford -	- 216
— Jacob v. -	- 119
— v. James -	- 210
ikey v. Higgs -	- 206
imb v. Milnes -	- 361
ipton v. White -	- 119
ish, Lowes v. -	- 219
ish's Estate, *Re* -	- 280
nn v. Chaters -	197, 198
se v. Kingdom -	- 135
acaulay v. Price -	- 257
acbryde v. Weekes	- 215
acdonald, Hall v. -	- 95
acfadden v. Jenkyns	- 99
acfarlane, *Re* -	- 329
ackenzie v. Mackenzie	283, 284

	Page
Mackintosh, Clarke v.	- 214
Mackrell, Kemp v. -	- 41
Macleod v. Annesley	- 118
Macnamara, Rigby v. -	- 37
Mackrath v. Marlar -	- 253
Mackray, Muller v. -	- 324
Mackrell, Legg v. -	114, 137
Mackreth v. Simmonds	- 146
Mackworth, Llewellyn v.	- 124
McCreight, Borrough v.	- 124
McCutcheon, Gardner v.	- 322
McDouall, Skinner v. -	- 208
McIver, Henderson v. -	- 132
McLeay, Edwards v. 242, 245, 255, 261	
McNamara v. Arthur -	- 253
McPherson, Cooke v. -	- 16
McQueen v. Farquhar	- 232
McVeagh v. Croal -	23, 36
Maddeford v. Austwick	214, 236, 245
Maddon v. Jackson -	- 18
Madgwick v. Wimble -	- 317
Magdalen College, Attorney General v. - -	- 124
Magnay, Middleton v.	- 147
Maguire, Ashburner v.	- 71
Mahony, Fitzpatrick v.	- 34
Mair, Utterson v. -	- 57
Maillardet, Foley v. -	- 32
Maitland v. Irving -	- 248
Major, Beecher v. -	- 109
—— Turner v. -	- 316
Malabar v. Malabar -	- 134
Malbon, Wells v. -	40, 115
Malden v. Fyson -	218, 233
Malet, *Re* - -	- 269
Maling v. Hill -	- 232
Malins v. Freeman -	- 194
Mallock v. Galton -	- 161
Malpas, Clarke v. -	- 256
Maltby v. Russell -	- 59
Manners, Dentore v. -	- 74
Manning, *Ex parte* -	- 226
—— Kekewich v. -	- 104
—— *Re* Trusts -	- 289
Mansell v. Teeney -	- 23
Mansfield, Powys v. -	- 73
Mapp, Seaton v. -	- 195
Marchant, Roberts v. -	- 202
Margravine of Anspach, Le Texier v. - -	- 313
Marlar, Mackreth v. -	- 253
Marlborough, Duchess of, Bruce v. - -	- 177
Marriage v. Skeggs -	- 97

	Page
Marryatt v. Marryatt	27
Marshall, Gardner v.	360
——— v. Sladden	313
——— v. Watson v.	43, 360
Martin, Foligno v.	253
——— v. Heathcote	315
——— v. Martin	302
——— v. Wichelo	15
Mascall, French v.	190
Mason v. Bogg	57
——— v. Mason	196
——— v. Stokes Bay Company	194
Massey v. Banner	118
——— Evans v.	300
Masters, Kendall v.	43, 111
Mathers, Pember v.	206
Mathew, Pratt v.	102
Mathews, Smith v.	101
Mathie v. Edwards	164, 332
Matson, Gedye v.	150
——— v. Swift	292
Maturin v. Tredennick	258, 262
Maule, Crawshay v.	308, 327, 329
Maulton, Frost v.	308
Maundrell v. Maundrell	177
Maw v. Topham	200, 213
Maxwell, Wells v.	216, 226, 229
May v. Selby	74
Maynard, *Re*	292
Meacher v. Young	300
Medlicott, Johnson v.	239
Meers, Stourton, Lord, v.	222
Mellersh v. Keen	308, 324
Mendes v. Guedella	121
Mennard v. Welford	286
Menzies v. Connor	41
Mercer, Cavendish v.	300
Messer, Boyle v.	144
Metcalf v. Pulvertoft	31
Meymott v. Meymott	324
——— Meymott v.	324
Middleton, Batchelor v.	182
Middleton, Crofts v.	191
——— v. Dadswell	79
——— v. Dodswell	127
Middleton, Lord, v. Elliott	184
——— v. Magney	147
Midgley, Wood v.	22
Milbanke, George v.	81
Millar v. Craig	22, 324
Millard v. Eyre	116
Miller v. Mackray	324
Millet v. Davy	333
Mills v. Hanson	318
Milnes, Lumb v.	361
Minchin v. Norval	227

	Page
Minet v. Lenan	218
Mirehouse v. Scaife	93
Mitchell, *Ex parte*	296
———Buckle v.	217
Mitchelson v. Piper	95
Mitford v. Mitford	359
Moat, Morison v.	316
Mockett's Will, *Re*	275, 276
Mogg v. Hodges	94
Mold, Rodhouse v.	54
Molton v. Camroux	191
Monck, Broome v.	253
Money, Kinnoul, Earl of, v.	151
——— *Re*	270
Monk, Green v.	223
Monkhouse, v. Corporation of Bedford	45
Montefiore, Hart v.	36
Montelieu, Elibank v.	359
Moons v. De Barnales	131
Moore, Clarke v.	212
——— Cole v.	116
——— Frere v.	177
——— Stokes v.	210
——— Stuart v.	295
——— Vansandau v.	308
——— Wilson v.	121
Moravian Society, *Re*	286
Morehouse v. Newton	35
Morgan, James v.	246
——— Osborn v.	360
——— Osborne v.	127
——— v. Shaw	230
——— v. Stevens	112
——— Wynn v.	213
Morison v. Moat	316
Morley, Mill v.	239
Mornington, Countess of, *Ex parte*	284
Morris, Down, Viscount, v.	158
——— Howland v.	226
——— Shepherd v.	14
——— Smith v.	213
——— Staines v.	206
Mortimer v. Bell	214
——— v. Picton	120
Moulson, Jewson v.	359
Mountford, *Ex parte*	143, 296
Mousley, Gresley v.	248
Mowbray, Gowing v.	42
Moxey v. Bigwood	214
Moxhay v. Inderwick	206
Moysey, Ripley v.	96
Mucklow v. Fuller	112
Muddle, Cole v.	122
Muggeridge, Annesly v.	229, 232

	Page
uggeridge's Will, *Re*	275
ulbany v. Dillon	111
ules, Smith v.	309
ullins, King v.	125
ulvehill, Butler v.	239
undel's Trusts, *Re*	281
unnings, Philips v.	84
urdock, Attorney General v.	136
urless v. Franklin	109
urray v. Lord Elibank,	127, 359
—— v. Palmer	261
urrell v. Goodyear	214
urton, *Ex parte*	321
assey v. Massey	14, 33
utlow v. Mutlow	90, 273
ıgle v. Baylor	239
ısh, Forrer v.	222
— Shelly v.	250
eale, Canham v.	97
eave, Palmer v,	250
ehemias, Bensusan v.	40
elson v. Bridges	207
—— Smith v.	38
—— v. Seaman	113
elthorpe v. Holgate	192, 241
erot v. Burnand	45, 308, 321
eve v. Pennell	178
eville, Taylor v.	196
—— v. Wilkinson	241
ew Brunswick Company v. Conybeare	256, 261
—— Conybeare v.	242
ew v. Jones	132
ewcastle Banking Co. Official Manager v. Hymers	55
ewdegate, Lane v.	216
ewell v. Townsend	316
ewland, Beckley v.	198
ewman, Day v.	236, 247
ewton, Morehouse	35
ewport v. Bury	29, 132
icholls v. Nicholls	247
icholson v. Knapp	229
ickol, Gibson v.	42
icol's Case	258
ickisson v. Cockhill	94
ickolson v. Tutin	105
—— v. Wodsworth	218
ield v. Morley	239
oad v. Backhouse	187
oble, Vulliamy v.	308, 314
oel, Ord v.	217, 252

	Page
Norcott, Byrne v.	134
Norman, *Re*	20
North, Price v.	259
Northumberland, Duke of, Jervoise v.	218
Norris, Robertson v.	165
Norton v. Cooper	41
—— Geary v.	39
—— Richardson v.	64
Norval, Minchin v.	227
Norwood, Elvy v.	178
Nutbrown v. Thornton	196
Obee v. Bishop	59, 84, 123
Ogilvie v. Foljambe	210
Oglander, Hood v.	40, 212, 233
Okill v. Whittaker	212
Onions v. Cohen	233, 254
Ord v. Noel	217, 252
O'Reilly v. Anderson	116
Ormrod v. Huth	215
Ormond, Blair v.	58
Ormond, Lord, Clarke v.	91
Orrett v. Corser	126
Osbaldiston v. Askew	218
Osborn v. Morgan	127, 360
——— v. Williams	238
Osborne v. Harvey	230
Otty, Davies v.	107
Oulton, Crallan v.	83
Outram, Bradshaw v.	158
Ovey, Pritchard v.	198
Owen v. De Beauvoir	124
—— *Ex parte*	319, 321
—— Williams v.	142
Owens v. Dickinson	91
Oxenford, Sheppard v.	317
Oxford, Earl of, Beavan v.	144, 177
Pacifico, Tabesco v.	334
Padget, Kent v.	178
Paignon, Heathcote v.	246, 247
Pain, Gleaves v. app.	361
Palk v. Clinton	150
Palmer, Harvey v.	77
——— Murray v.	261
——— v. Neave	250
——— v. Jets	57
Palmerston, Lord, v. Turner	226
Pannell v. Hurley	122, 251
Pare v. Clegg	15, 28
Parker v. Bristol and Exeter Railway Co.	11
Parkins, Hawkshaw v.	306

	Page
Parkinson v. Hanbury	165
Parr v. Lovegrove	220, 222
Parry, Cope v.	201
Parsons v. Groom	336
—— Hawkins v.	330, 308
Partridge, Lawford v.	334
Patch v. Shore	15, 34
Patent Derrick Co. v. Thames Iron Works Co. v.	148, 149
Paterson v. Scott	93
Paton v. Rogers	224
Patten, Wallace v.	47
Paynter v. Carew	166
Peach, Routh v.	26
Peacock v. Burt	176
—— v. Peacock	317, 329
Peake v. Highfield	235
Pearse, Gee v.	228
Pearson, Fairburn v.	317
Peat, Sittenden v.	26
Peckham v Taylor	100
Peel, Cockburn v.	120
Peile, Barker v. 40, 114, 115,	136
Pember v Mathers	206
Pemberton, Espin v.	163
—— Wortham v.	361
Pennell v. Deffell	110, 111
—— Neve v.	178
Pennington v. Bailey	58
Penny v. Watts	55
Pentland v. Stokes	124
Peppercorn, Gillett v.	111
Perkins, Brown v.	25
—— Reynoldson v.	17
Perry, Herrick, v. Attwood	163
—— v. Phelps	53, 60
Peto, Ponsardin v.	43
Petrie, Jackson v.	230
Peyton's Settlement, *Re*	283
Phelips, Perry v.	53, 60
Phelps v. Prothero,	252
—— v. Sprowle	24
Phillips v. Gutteridge	178
—— King v.	112
Phillippo v. Munnings	84
Phillipson v. Gatty	120
Phipps, Arundel v.	196
Pickard v. Sears	243
Pickering v. Dowson	236
—— Ely, Bishop of,	216
Pirkersgill, Bartlett v.	108
Pickford v. Brown	97
—— Lister v.	123
Picton, Mortimer v.	120
Pike, Vigers v.	257
—— Wilmott v.	177
Pillans v. Harkness	312
Piper, Cradock v.	93
Pitcher, Cooper v.	96
—— Dummer v.	109
Pitt's Will, Re	275
Pittard, Bond v.	305
Plummer, Taylor v.	110
Pocock, Drayson v.	126
Pollard v. Clayton	196
—— Cood v.	146
Ponsardin v. Peto	43
Ponsford v. Hartley	53, 63
Poole, Lewis v.	149
Pooley, Gompertz v.	252
Porters Trusts, Re	286
Prothero, Phelps v.	253
Portington, Taylor v.	195
Portland, Duke of, Topham v.	43
Portreeve of Avon v. Att. Gen.	113
Potter, Stanley v.	77
Poulter, Charlton v.	316
Powell v. Trotter	183
—— v. Wright	229
—— *Re*	280
Power, Drew v.	14
—— Tipping v,	95, 96
Powys v. Mansfield	73
Prance v. Simpson	315
Prater v. Prater	299
—— Prater v.	299
Pratt v. Bull	144
—— Cocking v.	248
—— v. Mathew	102
Preston v. Liverpool, Manchester and Newcastle Railway Co.	193
Prevost v. Bennett	42
Price, Cadwaller, Doe dem. v.	219
—— v Dyer	212
—— v. Ley	237
—— v. Macaulay	257
—— v. North	259
—— v. Price	70
—— v. Salusbury	220
Prideaux v Lonsdale	250, 313
Prime, Silk v.	90
Primrose, *Re*	293
Pritchard v. Ovey	198
Proctor, Thornton v.	324
Propert, *Re*	279
Pryihergch, Everett v.	127
Pullen, Bolton v.	322
Pulsford, Green v.	218
—— v. Richards	243, 244, 312
Pulvertoft, Metcalf v.	31
Purday, Chappell v.	41, 198
Putnam v. Bates	87

	Page
e, *Ex parte* -	73
arman v. Williams -	336
arrell v. Beckford -	43
dcliffe, *Re* -	152
nd, Lawn v. -	306
msden v. Langley	131, 183
phael v. Boehm -	131
stron, Dean v. -	246
wlings v. Wickham	243, 244, 312
ynes v. Wyse -	230
ad v. Bentley -	231
— v. Bowers -	316
dington v. Redington -	109
dman, Fuller v. -	88
ech v. Kennegal	134, 135
ed, Dawe v. -	116
es v. Fernie -	259
eve v. Whitmore -	36
gent's Canal Company v. Ware	194, 226
hden v. Wesley -	119
x v. Carlile -	12
ynell v. Sprye	216, 238, 260
ynolds v. Blake -	37
ynoldson v. Perkins -	17
odes v. Buckland -	166
—— Howard v. -	114
—— v. Ibbetson -	195
ccard v. Robson -	74
char, Jacob v. -	25
chard v. Barrett -	93
chards, Cock v. -	251
—— Jacobs v. -	191
—— Pulsford v.	243, 244, 312
chardson v. Bank of England	27, 127, 318
—— Boynton v. -	135
—— Jenkins v. -	92
—— v. Norton -	64
ches, *Re* -	356
cketts, Jones, v. -	39
dgway v. Wharton -	192
dley, Robinson v. -	182
gby v. Macnamara -	37
ley v. Croydon	156, 157, 362
oley v. Moysey -	96
st v. Hobson -	207
son, Stratford v. -	66
berdean v. Rous -	99
berts v. Kuffin -	35
—— v. Pocock -	95
—— v. Marchant -	202

	Page
Robertson v. Lockie -	308
—— v. Norris -	165
Robinson, Barnes v. -	361
—— Creasor v. -	55
—— v. Geldard -	94
—— v. Lowater -	280
—— v. Ridley -	182
—— v. Robinson -	120
Robson, Riccard v. -	74
—— v. Whittingham -	228
Roch, Tombs v. -	93
Rodhouse v. Mold -	54
Roe, Collard v. -	284
Rogers v. Challis -	207
—— Paton v. -	224
Rolfe v. Chester	177, 178
—— v. Gregory	124, 131
Rolt, Hopkinson v. -	176
Romford Market Case -	111
Rose v. Watson	147, 256
Ross, Forbes v. -	130
—— Weatherall v. -	42
Rosser, Borrowman v. -	252
Rotherham v. Rotherham -	54
Rothschild, Doloret v. -	215
Rothwell v. Rothwell -	127
Rous, Roberdean v. -	99
Routh v. Peach -	26
Routledge v. Grant -	209
Rowe v. Bant -	92
——, Gardiner v. -	100
Rowland v. Evans -	311
Rowley v. Adams -	321
Royds v. Royds -	135
Royle v. Wynne -	335
Rumbold v. Forteath -	43
Russ v. Milne -	223
Russell, *Ex parte* -	284
—— v. East Anglian Railway -	29
—— Hathornthwaite v.	127
—— v. Maltby -	59
—— v. Russell -	143
Rutter, Cud v. -	196
Ryall v. Ryall -	108
Ryan's Settlement, *Re* -	282
Sabine, Bellamy v.	260, 261
Sadd, Simpson v.	208, 225
Sainsbury v. Jones	207, 255
St. John v. St. John -	238
Salmon, Bartlett v.	240, 244
—— Cutts v.	248, 259, 261
—— Taylor v. -	192
Salter v. Bradshaw -	261

	Page
Salusbury, Price v.	220
Sanders v. Homer	283
Sanderson, Eglin v.	135
—— v. Walker	134
Sandford, Langham v.	107
Sane v. Bolton	221
Sandon v. Hooper	182
Sansom, Heath v.	308
Samble v. Wilson	170
Saunders, Dowle v.	163
Savage, Ardill v.	14
Savery, King v.	258
Saville v. Blackett	77
Scaife, Mirehouse v.	93
Scales v. Baker	110
Scandrett, De Costa v.	244
Scarborough, Earl of, Sharpe v.	92
Scarth, Wood v. 228, 231, 233,	237
Schofield v. Heap	73
Scholefield v. Lockwood 151,	274
Science, Hughes v. 295,	296
Scorell v. Boxall	208
Scott v. Beecher	127
—— v. Davies	248
——, Dimes v.	87
——, Hogart v.	222
—— v. Langstaffe	241
——, Paterson v.	93
—— v. Spaskett	360
——, Stapylton v. 236,	237
Scrivens, Wicks v.	156
Seagrim, Gibson v.	179
Seaman, Nelson v.	113
—— v. Vaudry	227
Searle v. Lane	59
Sears, Pickard v.	243
Seaton v. Fisher	182
—— v. Mapp	195
Selby, May v.	74
Senior, Higgins v.	192
Sewell, Berney v.	187
—— Clarke v.	87
Shakespeare, Thompson v.	74
Shakspeare, Sherwin v. 204, 225,	226
Sharp v. Adcock	218
Sharpe, Bullen v.	304
—— v. Earl of Scarborough	92
Sharpe's Trusts, *Re*	271
Sharples v. Adams	177
Sharpley's Trusts, *Re*	292
Shaw v. Bunny	166
—— Morgan v.	230
—— Taylor v.	25
Shelly v. Nash	250
—— v. Westbrooke	296
Shepherd v. Churchill	282
—— v. Morris	14
—— v. Oxenford	317
—— v. Smith 134,	135
Sheppard's Trusts, *Re*	289
Sherwin v. Shakspeare 204, 225,	226
Shewen v. Vanderhorst	88
Shirley, Forteblow v.	227
Shore, Patch v. 15,	34
Shorrock, Greenough v.	151
Short, Wilson v.	235
Shrewsbury and Birmingham Railway Company, Shrewsbury and Chester Railway Company v.	229
—— and Chester Railway Company v. Shrewsbury and Birmingham Railway Company	229
Shuttleworth v. Greaves	78
—— v. Howarth	46
Siddall, Rackham v.	113
—— Life Association of Scotland v.	113
Sidmouth v. Sidmouth	109
Sidebotham v. Barrington	222
Siggers v. Evans	105
Sikes v. Wild	196
Silk v. Prime	90
Silver. Tuck v.	30
Sims, Colburn v.	39
Simons, Cutler v.	230
—— Deller v.	231
Simmonds v. Haseltine	219
Simpson v. Fogo	160
—— Howden 235, 255,	256
—— v. Sadd 208,	225
—— Thompson v.	124
Sims, Ainslie v	334
Sinclair v. Jackson	178
Sincock, Hoskin v.	183
Skeggs, Marriage v.	97
Skett v Whitmore	101
Skey v. Bennett	58
Skinner v. McDowall	208
Skip, West v.	323
Sladden, Marshall v.	313
Slade, Wheatley v. 199,	213
Sleech v. Thorrington	360
Small v. Atwood 201, 241, 257,	260
Smark. Baker v.	335
Smith, *Re*	274
—— and Arnold's Estate, *Re*	269
—— Atkinson v.	156
—— v. Boucher	284

	Page
ıith v. Chichester	153, 228
—— v. Claxton	107
—— v. Etches	20, 149, 369
—— v. Everett	326
—— v. Garland	217
—— Gibson v.	15
—— v. Harrison	237
—— Helme v.	306
—— v. Hincksman	250
—— Horlock v.	183
—— v. Jeyes	317
—— Kay v.	125
—— King v.	333
—— v. Mathews	101
—— v. Morris	213
—— v. Mules	309
—— v. Nelson	38
——'s Settlement, *Re*	292
—— Shepherd v.	134, 135
—— v. Smith	73
—— v. ——	127
—— v. ——	320
—— v. ——	281
—— Tanner v.	229
—— Tassell v.	178
—— Warner v.	329
—— v. Watson	321
—— Yorke v.	44
mithson, Ackroyd v.	107
myth's Settlement, *Re*	289, 291, 292
need v. Sneed	22
now, Goddard v.	250
—— Wright v.	219
oames v. Edge	207
olicitor General v. Corporation of Bath	134
omerville, Lord Londesborough v.	86
outhgate, Att. Gen v.	97
packman v. Holbrook	95
—— v. Timbrell	64
paskett, Scott v.	360
pawforth, *Re*	283
pencer, Hampton v.	100
—— v. Topham	218
——, Vauxhall Bridge Company v.	238
pirett v. Willows	360
pittle, Hancock v.	232
porle v. Whayman	142
spratley, Griffiths v.	246
—— Watson v.	209
sproule, Phelps v.	24
sprye, Reynell v.	216, 238, 260
spurway v. Glynn	87
Squire v. Campbell	212
Stacy v. Elph	112
Stackhouse v. Barnston	126
Stafford, Wilkinson v.	247
Stahlschmidt v. Lett	95
Staines v. Giffard	271
—— v. Morris	206
Stanfield v. Hobson	153
Stangroom, Townshend v.	231
Stanley, Bedford and Cambridge Railway Company v.	103
—— v. Potter	77
Stansfield, Freeland v.	316
Stanton v. Tattersall	244, 257
Statham, Joynes v.	212
Steadman v. Lord Galloway	253
Steele v. Stuart	32
Steere, Toulmin v.	178
Stenson, Bown v.	208
Stevens v. Hotham	219
Stephenson, Esdaile v.	222, 224, 226
Stevens v. Austin	219
——, Cogan v.	107
—— v. Cook	324
—— v. Guppy	208
—— v. Morgan	112
Steward v. Hoare	132
Stewardson, Harrison v.	17
Stewart v. Forbes	45
—— v. Graham	230
Stilwell, Warden v.	309
Stocken v. Dawson	133, 234
Stokes Bay Company, Mason v.	194
—— —— Brice v.	121
—— —— v. Clendon	150
—— —— v. Heron	46
—— —— v. Moore	210
—— —— Pentland v.	124
Stone v. Godfrey	212
—— v. Wishart	29
—— v. Yea	216
Storer, Armstrong v.	67
Stoveld, Arkwright v.	196
Stourton, Weeks v.	186
—— —— Lord v. Meers	222
Stratford v. Bosworth	194, 231
—— v. Kitson	66
Stretch v. Watking	300
Stronge v. Hawke	95
Strutton, Hooper v.	280
Stuart v. Moore	295
—— Steele v.	32
Stukely, Kien v.	238
Sturgis v. Champneys	361
Stump v. Gaby	248, 260

	Page
Sutton Harbour Railway Company v. Hichins	41
Styan, Wynne v.	142, 150
Styning, French v.	305
Swan's Settlement, *Re*	272
Swift, Matson v.	292
Swinbourne v. Carter	336
Swinford, Kingsford v.	252
Sworder, Adams v.	14, 129
Symmonds, Mackreth v.	146
Symons v. James	195
Sympson, Prance v.	314
Taggert, Gent v.	360
Talbot v. Kemshead	42
Tambesco v. Pacifico	335
Tanfield v. Irvine	31
Tanner v. Dancey	96
——— v. Smith	229
Tapp, Beer v.	133
Tardrew v. Howell	96
Tassell, Smith v.	178
Tattersall, Stanton v.	244, 257
Taylor v. Allen	127
——— v. Brown	231
——— Fenner v.	360
——— Gaunt v.	136
——— v. Neville	196
——— Pecham v.	100
——— v. Plumer	110
——— v. Portington	195
——— v. Salmon	192
——— v. Shaw	25
——— Waters v.	327
Tebbs v. Carpenter	131
Telford, Johnson v.	131
Templer's Trusts, *Re*	281
Temperley, Brown v.	87
Terrett, Goodchild v.	63
Thacker, Drewry v.	97
Thames Ironwork Company v. The Patent Derrick Company	148
Thelluson, Vernon v.	61
Thomas v. Dering 199, 200, 213,	252
——— v. Jones	96
——— v. Thomas	177
——— v. Walker	40, 117
——— Williams v.	39
Thomas's Will, *Re*	270
Thompson v. Hodgson	153
——— Kirkwood v.	166
——— v. Shakespeare	74
——— v. Simpson	124
——— Travers v.	135
Thompson Tuckley v.	57, 170
Thomson v. Tomkins	268
Thorne v. Bigland	242
Thornhill, Flureaux v.	196, 253
Thornton v. Finch	91, 145
——— Nutbrown v.	196
——— v. Proctor	324
Thorrington, Sleech v.	360
Thrupp v. Collett	74
Townsend v. Stangroom	231
Thwaites, Glassington v.	82
Tidd v. Lister	127, 361
Till, Coslake v.	215
Tillstone's Trusts, *Re*	268
Timbrell, Spackman v.	64
Tipping v. Harris	184
——— v. Power	95, 96
Titley v. Davies	179
Tittenden v. Peat	26
Tobin, Beckford v.	87
Todd v. Wilson	132
Tombs v. Roch	93
Tomkins, Thomson v.	268
Tooke, Crosbie v.	219
Toone, Watson v.	61
Topham, Maw v.	200, 213
——— v. Portland, Duke of	43
——— Spencer v.	218
Torre v. Browne	47
Toulmin v. Copeland	318, 326
——— v. Steere	178
Townsend, Benbow v.	108
——— v. Champernoun	222
——— Newell v.	316
Thorn v. Bigland	242
Tuck v. Silver	30
Tuckley v. Thompson	57, 170
Tuffnell, Dewell v.	37
Turner v. Harvey	245, 252, 261
——— Fewster v.	231
——— v. Major	316
——— Palmerston, Lord, v.	226
——— *Re*	90
——— v. Wight	229
Turnley's Will, *Re*	273
Turquand, Whitmore v.	105, 106
Turrell, Clifford v.	198
Tutin, Nicholson v.	105
Trafford v. Boehm	120
Travers v. Thompson	135
Trecothick, Coles v.	210
Tredennick, Maturin v.	258
Tredwin v. Bourne	306
Trevor v. Wall	16
Trotter, Powell v.	183
Trower's Trusts, *Re*	269

	Page
yon, *Re*	137
veedy, Evans, v.	83
vistleton v. Griffith	251
ler's Trusts, *Re*	287
nderwood *Re*	281
nited Kingdom Life Assurance Company, *Re*	267, 274
rch v. Walker	112
tterson v. Mair	57
vedale v. Ettrick	116
ancouver v. Bliss	232
anderhorst, Shewen v.	88
ansandau v. Moore	308
audrey, Seaman v.	227
aughan v. Buck	361
auxhall Bridge Company v. Spencer	238
awdrey, Vernon v.	92
enables, Barker v.	232
ernon v. Thellusson	61
—— v. Vawdrey	92
ickers v. Bell	46
—— v. Cowell	150
—— v. Hand	226
igers v. Pike	257
igrass v. Binfield	127
incent, Wood v.	336
ize, Wrixon v.	159
ulliamy v. Noble	308, 314
Vade v. Hopkinson	296
Vakefield v. Buccleugh, Duke of	30
Vakeford, Greenwood v.	114
Valburn v. Ingilby	307
Valker, Flower v.	221
—— Hammond v.	27
—— Sanderson v.	134
— — Thomas v.	40, 117
—— Urch v.	112
—— v. Woodward	32
Vall, Trevor v.	16
Vallace v. Auldjo	360
—— Geddes v.	305
—— v. Patton	47
Vallis, Fordham v.	66
Valmesley v. Walmesley	326
Varburton v. Hill	268
ard v. Audland	103
— v. Grey	70
— Schroder v.	46
— v. Stilwell	309
—'s Will, *Re*	271
Ware, Regent's Canal Company v.	194, 226
Waring, *Re*	269
Warner v. Cunningham	310
—— v. Yorke	296
Warren, Hall v.	191
—— v. Smith	329
Warter v. ——	299
Warwick v. Bruce	191, 219
Wastell, Ford v.	144
Waters v. Taylor	327
Watking, Sketch v.	300
Watney v. Wells	310
Watts, Faulkner v.	300
Watson v. Birch	72
—— v. Marshall	360
—— Rose v.	147, 256
— — Smith v.	321
—— v. Spratley	209
—— v. Toone	61
Watts v. Hyde	21, 115
—— Penny v.	55
Watts' Settlement, *Re*	287
Waugh v. Land	150
Way v. Foy	45
Way's Trusts, *Re*	104
Weare, Adams v.	213
Weatherall v. Geering	219
Weatherley v. Ross	42
Webb v. Kirby	228
—— v. Webb	136
—— Webb v.	136
Webster v. Bray	324
—— v. Webster	78, 316
Wedgewood v. Adams	41, 96
Weeding's Estate, *Re*	279
Weeks v. Stourton	186
Weekes, Macbride v.	215
Welch, Jones v.	311, 331
Welchman, Farebrother v.	252
Welfit, Kime v.	302
Welford, Menard v.	286
Wellbeloved v. Jones	74
Wellesley v. Beaufort, Duke of	296
Wellington, Duke of, Alexander v.	198
Wells v. Malbon	40, 115
—— v. Maxwell 215, 216, 226, 229	
Wells, Watney v.	310
Wenham, Brookman v.	11
West, Baxter v.	310
—— Good v.	15
—— v. Jones	242
—— v. Skip	323
Wesley, Rehden v.	119
Westbrooke, Shelley v.	296

	Page
Westcott v. Culliford	41
Weston, Barnett v.	177
——— Fairthorne v.	311
——— v. Filer	284
——— Heath v.	70
Wetherell v. Collins	184
Whalley, Buckeridge v.	14, 34
——— v. Whalley	111
Wharton, Ridgway v.	192
Whayman, Sporle v.	142
Wheatley v. Slade	199, 263
Whichelo, Marten v.	15
Whitbread, *Ex parte*	143
Whitcomb, Goodman v.	310
White, ——— v.	212
——— v. Bradshaw	244
——— v. Cuddon	217
——— v. Foljambe	232
——— v. Hillacre	179
——— Jarvis v.	318
——— Jeakes v.	219
——— Lupton v.	119
Whitehead, Brighall v.	293
——— Jackson v.	214
Whitehouse, Fawcett v.	324
Whiting's Settlement, *Re*	271, 273
Whitmore, Hinde v.	369
——— Reeve v.	36
——— Skett v.	101
——— v. Turquand	105, 106
Whittaker, Darby v.	195
——— v. Howe	317
——— Okill v.	212
Whittingham, Robson v.	228
Wickham, Rawlins v.	243, 312
Wicks v. Scrivens	156
Wickwar, Edwards v.	214
Wight, Turner v.	229
Wiglesworth v. Wiglesworth	127
Wilcox v. Bellaers	223, 232
Wild, Henderson v.	306
——— v. Hillas	252
——— Sikes v.	196
Wilde v. Gibson	245
Wilkins v. Hogg	119, 121
Wilkinson v. Charlesworth	361
——— Neville v.	241
——— *Re*	280
——— v. Stafford	241
——— v. Wilkinson	137
Wilks v. Groom	280
Willan v. Willan	235, 237
Willett v. Blandford	326
Williams, Barber v.	306
——— Brettel v.	306
Williams, Calverly v.	236
——— Courtney v.	73
——— v. Edwards	228
——— *Ex parte*	308, 322
——— Keys v.	143
——— Osborne v.	258
——— v. Owen	142
——— Quarman v.	336
——— *Re*	290
——— v. Thomas	39
Wiliams's Settlement, *Re*	268
——— Trusts, *Re*	272
——— Wilson v.	232
Willis v. Jernegan	238
Willoughby, Foljamb v.	300
Willows, Spirett v.	360
Willey's Trusts, *Re*	272
Wilmot v. Pike	177
Wilson, Clarke v.	230
——— Greaves v.	221
——— v. Greenwood	317, 318, 326
——— v. Maddison	87
——— v. Moore	121
——— Samble v.	170
——— v. Short	235
——— Todd v.	132
——— v. Williams	232
Wimble, Madgwich v.	317
Winch, Coleman v.	177
——— v. Winchester	211
Winchelsea, Dering v.	323
Winchester, Winch v.	211
Winsor, Blundell v.	307
Winter v. Anson, Lord	147
——— Bagshaw v.	360
——— London and Birmingham Railway Company v.	212
Winch, Coleman v.	177
Wishart, Stone v.	29
Witherington v. Banks	333
——— v. Witherington	286
Wodsworth, Nicholson v.	218
Wollaston, Colt v.	235
Wood v. Abrey	247
——— Bartlett v.	38
——— Boehm v.	230, 262
——— v. Downes	216
——— Green v.	238
——— v. Hardisty	59
——— v. Lamberth	223
——— v. Midgley	22
——— v. Scarth	228, 231, 233. 237
——— Trusts, *Re*	271
——— v. Vincent	336

	Page
oodburn's Trusts, *Re*	271, 273, 334
oodgate, Acton v.	105
oodhouse, Farebrother v.	179
oodin, Flint v.	257
oods, Johnson v.	94
oodward, Walker v.	32
oodgate v. Gresley	122
ollam v. Hearn	231
orrall v. Harford	131, 137
ortham v. Pemberton	361
ragg, *Re*	289
right, Astle v.	325
—— v. Ball	197
—— v. Bowra	169, 284
right, Collen v.	192
—— Ellison v.	183
—— Gosset v.	161
—— Lomas v.	94
—— Powell v.	229
—— v. Snowe	219
——'s Trusts, *Re*	125
—— Will	268
Wrixon v. Vize	159
Wych v. East India Company	124
Wynch v. Grant	59
Wynn v. Morgan	213
Wynne, Hughes v.	83
—— Royle v.	334
—— v. Styann	142, 150
Wyse, Raynes v.	230
Wythes v. Lee	147, 256. 261
Yea, Stone v.	216
Yetts v. Palmer	57
Yorke v. Smith	44
—— Warter v.	296
Young, Barkworth v.	207
—— v. Fernie	19, 44
—— v. Griffiths	210
—— Kingsley v.	198
—— Meacher v.	300
—— *Re*	270

ERRATA.

Page
21, line 12, *for* "remembrancer," *read* "incumbrancer."
30, line 7, *for* "motion," *read* "notice."
67, note (*t*), *for* "Hare," *read* "Beav."
106, note (*o*), *for* "Limood," *read* "Limond," and add p. 298.
141, line 9 from bottom, *for* "cost," *read* "suit."
233, line 5, *for* "one" *read* "the."
369, line 21, *for* "and" *read* "or."

ADDENDA.

PAGE

37, line 25. By a bill which has passed the Lords, it is proposed to abolish the practice of opening biddings, except in cases of fraud.

86, line 14. The course here suggested is now adopted by the Court of Chancery, *Daubney* v. *Leake*, 35 L. J. Ch. 347, *Hubbard* v. *Latham*, 1 L. R. Notes, 105.

80, line 9 from bottom, after *Shaw* v. *Johnson*, add a reference to *Edmunds* v. *Waugh*, 35 L. J. N. S. Ch. 234, in which *Mason* v. *Broadbent*, 33 Beav. 296, is dissented from.

93, note (*z*). See also *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1 L. R. Eq. 593.

94, note (*b*), add *Noble* v. *Ward*, 12 Jur. N. S. 167.

214, note (*r*), add a reference to *Hume* v. *Pocock*, 1 L. R. Eq. 662.

216, note (*g*), add *Blackett* v. *Bates*, 1 L. R. Ch. App. 117.

242, note (*w*), add See *Ex parte Briggs*, 1 L. R. Eq. 483.

279, line 17. See however *Re Russell's Estate*, 1 L. J. Notes, 106.

289, line 17. It seems settled by *Paterson* v. *Paterson*, 14 W. R. 601, that the lord's consent need not be obtained before drawing up the order.

362, line 9. *Griggs* v. *Gibson* is now reported 1 L. R. Eq. 685.

448. The 17th and 18th sections are repealed, see p. 460.

THE COUNTY COURTS EQUITABLE JURISDICTION ACT.

28 & 29 Vict. c. 99.

An Act to confer on the County Courts a limited Jurisdiction in Equity. [5th July, 1865.]

WHEREAS it is desirable to confer on the County Courts jurisdiction in equity: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Jurisdiction in equity to be exercised in County Courts in certain suits and matters.

1. The County Courts held by virtue of an Act passed the session of Parliament holden in the ninth and tenth years of the reign of her Majesty, chapter ninety-five, shall have and exercise all the power and authority of the High Court of Chancery in the suits or matters hereinafter mentioned; that is to say,

1. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law, or next of kin, in which the personal, or real, or personal and real, estate against, or for an account or administration of, which the demand may be made, shall not exceed in amount or value the sum of five hundred pounds:
2. In all suits for the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds:
3. In all suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage charge or lien shall not exceed in amount the sum of five hundred pounds:
4. In all suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property, where the purchase money shall not exceed the sum of five hundred pounds:
5. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of five hundred pounds:

6. In all proceedings relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds:

7. In all suits for the dissolution or winding-up of any partnership in which the whole property stock and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds.

8. In all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by this Act to the County Court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the Court to which the application for the order to stay proceedings is made.

In matters under this Act, judge and officers of the County Courts to have the powers and authorities of a judge and officers of the Court of Chancery.

2. In all such suits or matters the judge of a County Court shall, in addition to the powers and authorities now possessed by him, have all the powers and authorities, for the purposes of this Act, of a judge of the High Court of Chancery; and the treasurer, registrar, and high bailiff shall, in all matters in which the County Court has jurisdiction under this Act, discharge any duties which an officer of the Court of Chancery can discharge, either under the order of a judge of such Court or the practice thereof, and all officers of the County Courts shall, in discharging such duties, conform to any rules or orders to be framed as hereinafter provided.

Power to a Vice Chancellor to order transfer of suits from County Court to Court of Chancery,

3. Any one of the Vice Chancellors, on the application at chambers of any party to any suit or matter pending under this Act, shall have power, then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the Court of Chancery, upon such terms, if any, as to security for costs or otherwise, as he may think fit.

City Small Debts Court to have same jurisdiction in all matters as a Metropolitan County Court.

4. The judge and officers of the Court held under the provisions of "The London (City) Small Debts Extension Act, 1852," hereinafter called the "City Court," shall respectively have and exercise the like jurisdiction, powers and authorities in all respects, except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a Metropolitan County Court; and the chief clerk and the chief bailiff of the City Court shall henceforth be respectively styled the registrar and high bailiff thereof, the word "registrar" being interpreted to include the assistant clerks, and the words "high bailiff" the bailiffs of the City Court; and the fees which may be from time to time taken in a County Court in any proceeding in which jurisdiction is hereby given to the judge and officers of the City Court shall be taken in the City Court, and shall be paid into the general fund thereof, and the judge and officers of the

ity Court shall, out of the said general fund, be respectively paid additional salaries of such amount as the mayor, ldermen, and commons of the city of London, in common ouncil assembled, from time to time shall think fit to direct; nd such judge and officers of the City Court shall conform o the rules and orders made under the authority of this ct.

Power to judge of a County Court to order any legacy, &c. to which an infant or person beyond the seas may be entitled to be paid into the Bank of England, in accordance with provisions of sect. 32 of 36 G. 3, c. 52.

5. Any legacy or sum of money to which any person who s an infant or absent beyond seas may be found or declared ntitled by any County Court in any suit or matter under his Act may be ordered by the Court to be paid to the Accountant General of the Court of Chancery, in accordnce with the provisions of section thirty-two of an Act assed in the session of Parliament held in the thirty-sixth ear of the reign of his Majesty King George the Third, hapter fifty-two; and the person ordered to pay the same hall, within such time as the Court shall direct, produce to he registrar of the Court the certificate of the Accountant General of the payment of such money; and if default be nade in such payment the judge may direct a warrant of xecution to issue to the high bailiff of the Court, who by uch warrant shall be empowered to levy or cause to be evied by distress and sale of the goods and chattels of such erson a sum of money equal in amount to the sum which e was ordered to pay to the said Accountant General and o the costs incurred by reason of such default, and the um so levied shall be paid to and be receivable by the said Accountant General under the direction of the Court; and ll amounts so paid or transferred into the Court of Chanery, with any dividends thereon, shall be paid or transerred to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application by ummons to one of the Vice Chancellors while sitting at Chambers.

Act not to impair Jurisdiction of Stannaries Court.

6. Nothing in this Act contained shall be construed to mpair the jurisdiction of the Stannaries Court, or to give uthority to any County Court judge to entertain jurisdicion in any case to which the equitable jurisdiction of the aid Court at present extends.

Provisions of County Court Acts as to juries, suitors, and witnesses extended to suitors and witnesses under this Act.

7. Whenever it is required that a jury should be summoned for the trial of any matter arising out of the jurisdiction given to the County Courts by this Act, it shall be summoned from the list of jurors in the possession of the registrar of the County Court in which the suit or matter has been brought; and all the enactments relating to the summoning, impannelling, and swearing of a jury in a County Court, and to the number of the jury and the unanimity of their verdict, shall apply to every jury summoned under this Act; and the duties and obligations of and upon all jurors, suitors and witnesses, and their liability to penalty and punishment, shall, in any proceeding under this Act, be the same as those created, authorized, and

imposed by the several statutes now in force relating to County Courts.

Power to enforce judgments of County Courts in equity.

8. For the due execution of any judgment, decree, or order made under the authority of this Act, or of the rules and orders to be framed as hereinafter provided, the Court shall have power to order, and the registrar upon such order shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree, or order of the said Court; and such writs, warrants and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed as hereinafter provided.

Where amount of subject-matter of suit exceeds limit of the jurisdiction of County Court, suit may be remitted to Court of Chancery, &c.

9. If during the progress of any suit or matter it shall be made to appear to the Court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellors' Courts as the Lord Chancellor may by general order direct; and such Vice Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred: Provided always, that it shall be lawful for any party to apply to such Vice Chancellor at Chambers for an order authorizing and directing the suit or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the County Courts; and the Vice Chancellor, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order.

In what Courts proceedings shall be taken.

10. With respect to the Court in which proceedings in equity shall be taken—

1. Proceedings under this Act which relate to the recovery or sale (*a*) of any mortgage, charge, or lien on

(*a*) The words "recovery or sale" are peculiar, but they may be explained in the following way:—

The County Courts Amendment Bill of 1864, referred to proceedings at law, as well as to proceedings in equity, and gave jurisdiction in suits seeking "the *recovery or sale* of any lands, &c.," where the annual value did not exceed £10. Accordingly, section 26 of this Bill was appropriately expressed thus:—

"With respect to the Court in which proceedings *in Equity* shall be taken:

"1. All proceedings under this Act which relate to the *recovery* of any lands, tenements and hereditaments, shall be taken in that County Court within the district of which the lands, tenements, or hereditaments, or the greater part thereof, are situate," &c.

lands, tenements, or hereditaments, shall be taken in that County Court within the district of which the lands, tenements, or hereditaments, or any part thereof, are situate:

2. Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the County Court within the district of which the persons making the application, or any of them, reside or resides:

3. Proceedings for the administration of the assets of a deceased person shall be taken in the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode:

4. Proceedings in partnership cases shall be taken in the County Court within the district of which the partnership business was or is carried on:

5. Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the County Court within the district of which the defendants, or any one of them, reside or resides, or carry on or carries on business:

6. Proceedings in any suit or other matter under this Act, which are not otherwise provided for, shall be taken or instituted in the County Court within the district of which the defendants, or any or either of them, shall reside or carry on business.

As to transfer of suit from one County Court to another.

11. If during the progress of a suit or matter it shall be ıde to appear to the Court that the same could be more ıveniently prosecuted in some other County Court, it all be competent for the Court to transfer the same to ch other County Court, and thereupon the suit or matter all proceed in such other County Court.

Remuneration of registrars and high bailiffs in matters of equity.

12. The registrars and high bailiffs of the County Courts all be remunerated for the duties to be performed by em under the jurisdiction in equity given to the Courts this Act, by receiving for their own use such fees as may from time to time authorized to be taken by any orders be made by the Commissioners of the Treasury, with the nsent of the Lord Chancellor; and the Commissioners of e Treasury are hereby authorized and empowered, with ch consent as aforesaid, from time to time to make such lers.

Many parts of the Bill of 1865 were evidently framed by ering or interlining a copy of the Bill of 1864. In the Bill of 65, as sent by the Lords to the Commons, clause 1 of sect. 10 as follows:—

"Proceedings under this Act, which relate to the recovery or e of,—or to any mortgage charge or lien on,—lands, &c., shall taken, &c."

In the Commons the words "or to" seem to have been uck out, and the result is the clause in the text.

Certain fees to be taken and to be paid over to the Consolidated Fund, and the salaries of the judges to be increased by £300 a year.

13. In addition to the fees to be authorized to be taken by order of the Commissioners of Her Majesty's Treasury as aforesaid, there shall be paid by the suitors the several fees which are specified and set forth in the schedule to this Act, or such further or other fees as the said Commissioners, with the consent of the Lord Chancellor, shall from time to time by order direct, which fees shall be received by the registrar of the Court, and accounted for and paid over by him to the treasurer of the Court, who shall, at such times as the said Commissioners shall direct, pay such fees into the Bank of England to the credit of the Paymaster General, to be by him paid over to the credit of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, and the salaries paid out of such fund to the judges of the County Courts shall be increased by three hundred pounds a year: Provided always, that the salary of the successor to any Judge who under this Act shall receive a larger salary in the whole than one thousand five hundred pounds shall not exceed one thousand five hundred pounds: Provided also, that if any judge heretofore appointed shall resign his office by reason of any permanent infirmity before he shall have received or become entitled to receive the increased amount of salary payable to him under this Act for the full period of five years, any annuity which the Lord Chancellor may recommend to be paid to him upon such retirement shall be calculated with reference to the average amount of salary received or receivable by him for the five years next preceding the date of such retirement, and not with reference to the yearly salary which he shall be entitled to as a Judge of a County Court at the time of presenting his petition for the grant of an annuity.

Judge not obliged to hold Courts in the month of September.

14. No Judge of any County Court shall be obliged to hold any Courts during the month of September in any year, unless he shall be ordered by the Lord Chancellor so to do; and if any Judge shall be desirous of holding Courts in the said month of September, and of being relieved from the obligation to do so at some other period of the year, it shall be lawful for such Judge, with the sanction of the Lord Chancellor, to close the Courts upon his circuit for any period or periods of time of which the Lord Chancellor shall approve, not exceeding in the whole four weeks in any one year; provided always, that every County Court shall always be open for the receipt and payment out of money due under any order of the Court, pursuant to the rules and orders in force for the time being, or for any proceeding in bankruptcy before the registrar.

As to registry of judgments in London.

15. Such of the judgments and decrees as may be directed by any rule or order shall be registered with the registrar of County Court judgments in London in such manner as may be therein directed.

Power to frame rules and orders

16. The County Court judges appointed or to be appointed by the Lord Chancellor from time to time to frame

es and orders for regulating the practice of the Courts, under 19 & 20 Vict. c. 103.
l forms of proceeding therein, under the thirty-second
tion of an Act passed in the nineteenth and twentieth
ars of the reign of her present Majesty, chapter one hun-
ed and eight, shall frame the rules and orders for regu-
ing the practice of the County Courts under this Act,
d forms of proceedings therein, and from time to time
end such rules, orders, and forms; and such rules, orders,
d forms, or amended rules, orders, and forms, certified
der the hands of such judges or of any three or more of
em, shall be submitted to the Lord Chancellor, who may
ow or disallow or alter the same, and so from time to
ne; and the rules, orders, and forms, or amended rules,
ders, and forms, so allowed or altered, shall, from a day
be named by the Lord Chancellor, be in force in every
unty Court.

17. The County Court judges mentioned in the last sec- Scale of costs to be framed by the Judges.
n shall be empowered to frame a scale of costs and charges
be paid to counsel and attorneys with respect to all pro-
edings which are herein authorized to be taken, and from
ne to time to amend such scale; and such scale or
nended scale, certified under the hands of such judges or
y three or more of them, shall be submitted to the
ord Chancellor, who from time to time may allow or dis-
low or alter the same; and the scale or amended scale so
lowed or altered shall, from a day to be named by the
ord Chancellor, be in force in every County Court.

18. If any party in a suit or matter under this Act shall Parties aggrieved may appeal.
e dissatisfied with the determination or direction of a
idge of a County Court on any matter of law or equity,
on the admission or rejection of any evidence, such party
ay appeal from the same to the Vice Chancellor autho-
zed as aforesaid, provided that such party shall, within
irty days after such determination or direction, give notice
such appeal to the other party or his attorney, and also
eposit with the registrar of the County Court the sum of
n pounds as security for the costs of the appeal; and the
id Court of Appeal may make such final or other decree
order as it shall think fit, and may also make such order
ith respect to the costs of the said appeal as such Court
ay think proper, and such orders shall be final: provided
at nothing herein contained shall authorize any party to
peal against any decision of a County Court, given upon
y question as to the value of any real or personal pro-
erty, for the purpose of determining the question of the
risdiction of the Court under this Act, nor to appeal
gainst the decision of a County Court on the ground that
e proceedings might or should have been taken in any
her County Court.

19. In any case which may be the subject of an appeal Appeal to be made either to the High Court of
nder this Act in causes arising within the county palatine
Lancaster, the appeal may be made either to the High

Chancery or a Vice Chancellor (*b*).

Court of Chancery or a Vice Chancellor thereof, or to the Court of Chancery of the county palatine of Lancaster or the Vice Chancellor thereof; and that in case of an appeal to the Court of Chancery for the said county palatine or the Vice Chancellor thereof, the order on such appeal shall have the same effect as if it had been made by a Vice Chancellor of the High Court of Chancery; but no appeal shall be made to the Court of Chancery of the said county Palatine or the Vice Chancellor thereof unless the consent thereto in writing of the respondent or respondents on such appeal, or of his or their solicitor or solicitors, shall be first obtained.

20. [Registrar of the Bloomsbury County Court to be entitled to retire from his office with compensation.]

This Act and 9 & 10 Vict. c. 95, and any Act amending or altering the same, to be construed together.

21. This Act and the Act passed in the session of Parliament holden in the ninth and tenth years of the reign of her present Majesty, chapter ninety-five, and any Act amending or altering the same, shall be read and construed as one Act, as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were repeated and re-enacted in this Act (*c*).

22. [Salary of T. Rodgers, Esq., as joint registrar of the County Court at Sheffield, to be 700*l.* a year.]

Commencement of Act.

23. The provisions of this Act shall come into operation on the first day of October one thousand eight hundred and sixty-five, except the provisions relating to framing a scale of costs and making rules and orders of practice and forms of proceeding, and except the provision which relieves the judges from the obligation of holding Courts during the month of September without the order of the Lord Chancellor, which provisions shall come into operation on the passing of this Act.

SCHEDULE.

	£	*s.*	*d.*
On the commencement of every suit or matter -	0	10	0
On setting down any matter for hearing - -	1	0	0
On application for final decree or decretal order	1	0	0

(*b*) This marginal note seems to be incomplete.

(*c*) This section was introduced by the Commons. There must necessarily be great difficulty in determining how far enactments originally made with exclusive reference to the principles of the common law, and expressed in the technical language of that system are not inconsistent with the requirements of a wholly different system of jurisprudence, having a technical language of its own.

PART I.

GENERAL PART.

Jurisdiction 9
Plaint 12
Parties 16
In what Court Proceedings are to be commenced . . . 18
Filing and Service of Plaint . 20
Security for Costs . . . 20
Amending Plaint . . . 20
Defendant's Statement . . 21
Defences
Want of Jurisdiction . . 24
Release. 24
Plaintiff suing on Voidable Deed. 24
Account Settled . . . 25
Accord and Satisfaction . 25
Former Decree . . . 25
Award 26
Interlocutory Applications
Payment, or Deposit, into Court 27
Receiver 28
Interlocutory applications—continued
Injunction 29
Other ex parte *Applications* . 31
Evidence at Hearing . . . 32
Decree at Hearing . . . 33
Accounts 33
Vouchers, &c. 35
Sales by Court 36
Costs Generally . . . 38
Appeal as to Costs . . 41
Revivor for Costs . . . 41
Where Defendant Disclaims . 42
Of Issues 42
Of Interlocutory Applications 42
Enforcement of Decrees . . 43
Appeal 44
Costs of Appeal . . . 46
Proceedings under particular statutes 47
Transfer to the Court of Chancery 47

Jurisdiction.] The 28 & 29 Vict. c. 95 enacts (s. 1) that the County Courts "shall have and exercise all the power and authority of the High Court of Chancery in the suits and matters hereinafter mentioned." It has been suggested that these words, coupled with the language of s. 2, entirely oust the jurisdiction of the High Court of Chancery in the suits and matters made cognizable in the County Courts. But the object of the Act, as expressed by the preamble, is

Jurisdiction of County in matters of equity not exclusive.

merely to "confer on the County Courts jurisdiction in equity" not to transfer to them the jurisdiction of the Court of Chancery, and it is a well established rule of construction that the jurisdiction of the superior Courts cannot be ousted but by express words, or necessary implication (*a*), or, as the proposition is otherwise stated, cannot be ousted by general words, without express and particular words (*b*). It is, therefore, conceived, that under this Act the jurisdiction is *concurrent*, not *exclusive*.

It may be remarked that the jurisdiction of the County Courts, as regulated by the orders and rules, is by no means so far-reaching as that of the Court of Chancery, and that for this reason a deprivation of the latter jurisdiction would in some cases, *e. g.*, where it was necessary to obtain discovery from the defendant before the hearing, leave the subject without any effective remedy.

General Orders of the High Court of Chancery.

Sects. 1 and 2 must be read in conjunction with sect. 16, conferring on the five judges the power of making rules and orders as to practice and procedure. The practice and procedure is to flow from these rules and orders, and the general orders of the High Court of Chancery are not applicable in their entirety to the County Courts, since the jurisdiction of the latter is both limited as to amount and circumscribed as to practice and procedure by the enactments of the statute which confers it.

Transfer to the Court of Chancery.

It will be observed that s. 3 gives a power to the Vice Chancellors (not to the Master of the Rolls) to transfer causes to the High Court. It is conceived that the general power of removing a cause from an inferior Court of Equity into the High Court by a *certiorari* bill (*c*), applies to pro-

Certiorari bill.

(*a*) Cates v. Knight, 3 T. R. 442; Crisp v. Bunbury, 8 Bing. 394; Dwarris on the Statutes, 652.

(*b*) Smith and Others, Commissioners of Sewers, 1 Mod. Rep. 44; Callis on Sewers, 289; See 2 Inst. 446.

(*c*) See Van Heythuysen's Equity Draftsman, 8, 131; 2 Madd. Ch. Pr. 249; West's Symbol. part 2, pp. 258, 286.

ceedings under this Act, and is not excluded by the 3rd section. It can, however, only be used subject to the provisions contained in the previous County Court Acts as to proceedings by *certiorari* (*d*), and probably there is hardly any case in which it will be more beneficial than an application under sect. 3.

Power of the judge to make orders when out of the district to which the cause belongs.

It is a general principle of the common law, that a Court having a restricted local jurisdiction cannot be held out of the limits of its territory. If, however, a County Court is once properly seized of a suit or matter, it is conceived that, by virtue of section 2, the judge of the Court has exactly the same authority in reference to that suit or matter, as a judge of the High Court of Chancery would have, had the suit or matter been commenced in the latter Court. Since, therefore, a judge of the High Court of Chancery might, by virtue of the inherent powers of the Court, grant injunctions and make other orders of a pressing nature, wherever he happened to be in England or Wales, it is conceived that the judge of the County Court has an equal power. It will not, therefore, be necessary that a County Court judge should be within the territorial limits of the district to which a suit or matter belongs, in order to his making orders of the kind referred to, and the language of Order XII., r. 3, seems to support this view. It is true, indeed, that an express clause was inserted in the 13 & 14 Vict. c. 43 (*e*), giving the Vice Chancellor of the Duchy Court of Lancaster power to make certain orders when himself out of the jurisdiction. But in that case the previous absence of such a power depended not on the construction of any statute, but on the fact that the *jura regalia* originally granted to the Duke of Lancaster are, of course, strictly confined within their territorial limits.

(*d*) 9 & 10 Vict. c. 95, s. 90; 19 & 20 Vict. c. 108, s. 38; 13 & 14 Vict. c. 61, s. 16, and see 15 & 16 Vict. c. 54, s. 4, and Parker v. Bristol and Exeter Railway Company, 20 L. J. Ex. 112; Brookman v. Wenham, 20 L. J. Q. B. 278.

(*e*) Sect. 13.

Value of subject matter beyond £500

A County Court has jurisdiction in those cases only which, as to value and locality, satisfy the criteria of sects. 2 and 10. The decision of the judge on these points is, however, without appeal, and the 9th section validates all orders, &c., made before an excess of value is discovered. It is possible that if neither party raises the objection, a suit concerning property of a much larger value may be carried through.

As we shall see directly, the plaint must contain an allegation as to the value of the property in dispute, and the circumstances of locality giving rise to the jurisdiction of the particular Court will also appear on the face of the proceedings. When a suit is terminated, the records of the Court will be conclusive, as between the parties and those claiming under them (*f*). If, therefore, they are regularly framed, it will not be possible to dispute the jurisdiction of the Court in any matter, after it is concluded, even although the jurisdiction may, in fact, have been exceeded.

Abandonment of excess to give jurisdiction.

It is conceived that under 9 & 10 Vict. c. 95, s. 63, as affected by s. 21 of the recent Act, a plaintiff may reduce his demand below £500 by abandoning the excess. It is, however, only in suits for foreclosure, or for specific performance by the vendor, or to repair a breach of trust, that there is a money demand.

Plaint.] By Order I., r. 3, every plaint in equity shall contain a concise statement of the grounds upon which the plaintiff seeks to obtain relief, and shall ask for the specific relief to which he conceives himself entitled, and also for general relief.

The language here used is in substance the same as that adopted in the 15 & 16 Vict. c. 86, s. 10, and it is, therefore, conceived that the rules of the Court of Chancery, as to the mode in which facts are to be pleaded, are applicable to plaints in the County Court, with such modifications as circumstances require.

(*f*) R. v. Carlile, 2 B. & Ad. 262.

Difference between pleadings at law and equity.

There is an important difference between the
des of pleading adopted at law and in equity.
e declaration at law contains, in short and
neral terms, a statement of the plaintiff's griev-
ce, and the particulars are left to come out
the evidence. In equity the plaintiff is re-
ired to plead the facts so circumstantially as in
t to plead the evidence of these facts (*g*), *e. g.*,
laintiff seeking to set aside an instrument as
ving been obtained from him by fraud, must
tail the circumstances constituting the fraud:
law a plea that the execution was obtained by
ud would in general be sufficient, without
tailing the circumstances of the fraud (*h*).
also a mere general allegation that the
fendant obtained property as a trustee for
e plaintiff is not sufficient: the plaint must
ew how he became a trustee.

One reason for this particularity is, that the de-
ndant may know the precise grounds upon which
e plaint against him is filed, and the certainty
quired is limited by this principle. Thus, in a
t for specific performance of an agreement
quired to be in writing, but which is collected
m several letters, it is not necessary to set out
the letters relied upon; it is sufficient to allege
e fact of the letters, and to put them in as
idence (*i*). It is, however, in general better to
te the letters so far as they are material. So,
o, the substance of conversations may be stated,
d the details left to come out in the evidence.
nd where a fact is put in issue it is not neces-
y to state the materials of which the proof of
at fact consists. Thus, it is sufficient to allege
at a person is insane, or an habitual drunkard,
a lewd woman, and to leave it to the evidence
bring out particular acts of insanity, drunken-
ss, or misconduct (*k*). But, on the other hand,
nere allegation that a person was of bad cha-
cter would probably be held insufficient to
und any evidence upon.

Letters constituting an agreement.

Pleading conversations.

In what cases a general allegation is sufficient.

(*g*) See Dan. 308, 788 (4th edit.)
(*h*) See 15 & 16 Vict. c. 76, Sch. B., No. 51.
(*i*) Dan. 340 (4th edit.) (*k*) Dan. 788.

Defendant setting up a settled account.

In the Court of Chancery a plaintiff cannot open a settled account without alleging specific errors (*l*), and, therefore, if to a bill, *e. g.*, a foreclosure bill, seeking a general account, the defendant plead a settled account, the plaintiff is compelled to amend his bill and point out specific errors. It seems doubtful whether the plaintiff, in the County County, will be able to adopt this course, as he can only amend upon leave at the hearing. Where therefore the course is practicable, it will be desirable to meet the defence by stating that the defendant pretends such an account settled, and then alleging specific errors. But this course is not often practicable until the defendant has answered.

Plaint seeking to charge wilful default.

If a plaint seek to charge a defendant, executor or trustee, with wilful default, at least one act of wilful default must be alleged and proved (*m*), but this does not apply to the case of a trustee who has himself acquired a portion of the trust property by purchase. Such a defendant will be repaid his purchase-money, but compelled to account as a mortgagee in possession, that is, for rents, &c. which he has, or but for his wilful neglect and default might have, received (*n*).

Charges and pretences.

An instance of a *pretence* has just been referred to. It is sometimes a useful mode of anticipating a defence and replying to it beforehand. In the Court of Chancery it is often used as a foundation for an interrogatory; but interrogatories are not allowed in the County Courts before the hearing.

Accounts, inquiries, directions, &c.

Where the case alleged and proved is such as clearly to shew that the plaintiff is entitled to some relief, it may be necessary that certain accounts should be taken and inquiries made before a final decree can be pronounced. If any special inquiries are desired by either plaintiff or defendant, there must, in general, be some evidence leading the Court to believe that the inquiry will not be useless. In general, a party

(*l*) Shepherd v. Morris, 4 Beav. 252; Drew v. Power, 1 Sch. & Lef. 182; Buckeridge v. Whalley, 33 L. J. Ch. 649.

(*m*) Massey v. Massey, 2 Jo. & H. 728.

(*n*) Adams v. Sworder, 3 N R. 623.

ng for an inquiry takes it at his own risk, if it be found against him must pay the costs t, however the general costs of suit are ne (*o*). An inquiry will not be directed as to s which are the foundation of the relief ght (*p*).

plaintiff seeking an injunction should allege the defendant *threatens and intends* to do ontinue doing the wrongful act (*q*), and should specifically for the very injunction re- ed (*r*). A receiver may be appointed *at the ring*, though the appointment is not specifically ed for (*s*), but this does not apply to inter- tory applications (*t*).

Frame of plaint seeking an injunction.

must be remembered by practitioners who for the first time engaged in preparing plead- in equity, that suits in equity are very fre- ntly suits for the benefit of a great number of ons other than the plaintiff, and that in suits administration, the defendant is often sub- tially a nominal party, and therefore the suit ot a simple contention between the plaintiff the defendant.

Where suit not a simple contest between the plaintiff and defendant, the plaint should state all material facts known to the plaintiff.

n claims, a mode of proceeding in the Court Chancery, in many respects analogous to nts, it was a rule that the Court would give no ef if material facts known to the plaintiff were stated (*u*); and this will probably be the rule in County Courts in administration suits, where Court is entitled to all the information which plaintiff can give it. It must, however, be emberecl that the defendant to a claim could plead his case by filing an answer, or state- nt. In the County Court, if it is not an ad-

) See per Kindersley, V. C., in Patch v. Shore, cited *post*, p. 34.
) Lechmere v. Brazier, 2 J. & W. 289; Marten v. Whichelo, & Ph. 257.
) Gibson v. Smith, 2 Atk. 182.; See Sch. A to the Cons. rs, pars. 6, 7.
) Burdett v. Hay, 33 L. J., ch. 41.
) Ord. V. r. 3.
Pare v. Clegg, 9 W. R. 216. *Quære*, whether, on motion e the hearing for an injunction or receiver, the Judge can id *instanter*, and insert the proper prayer if justice requires See Order XIII. In the Court of Chancery it seems this ot be done; Pare v. Clegg (loc. cit.)
) Good v. West, 9 Hare, 378.

ministration suit, but a simple contest between plaintiff and defendant, the plaintiff may properly leave it to the defendant to state his own case.

So also in plaints for an *ex parte* injunction, &c.

The necessity of setting out all the material facts known to the plaintiff is more than ordinarily cogent on *ex parte* applications. In such cases as in cases of insurance *uberrima fides* is required, and the plaintiff must disclose all facts known to him and likely to influence the judgment of the Court, whatever may be his own opinion of their importance, and an *ex parte* injunction, obtained otherwise than by the most truthful accuracy, will be dissolved with costs (*v*).

Plaint should shew jurisdiction, both as to locality and value.

The jurisdiction of the County Courts being limited in amount, it must, it is apprehended, appear on the face of the plaint, that the property in question does not exceed in amount or value £500. It is clear in an inferior Court of limited local jurisdiction, the proceedings must shew on the face of them, that the cause of action arose within the jurisdiction (*w*), and it is conceived that the same principle applies, where the jurisdiction is limited as to value. In the common law cases, the amount of the plaintiff's demand necessarily appears in the declaration, even in detinue; and it will be observed, that all the forms of plaint given in the Schedule to the orders and rules contain an allegation of value and also an allegation as to locality, bringing the suit within the jurisdiction of the particular Court, in all cases where the address of the defendant is not sufficient for that purpose.

Mode of printing or writing prayer.

It is usual, in Chancery proceedings, to print or write the prayer of a bill or petition with an inner margin. This mode is convenient to the eye, and may be usefully adopted in the County Courts.

Parties.] The general rule of Courts of Equity, in respect of parties is, that all persons materially interested in the object of the suit ought to be made parties, either as plaintiffs or

(*v*) Hilton v. Lord Granville, 4 Beav. 130; Cr. & Ph. 283; Dalglish v. Jarvie, 2 Mac. & G. 231, see p. 243. See *post*, p. 3

(*w*) Wms. Saunders, 90, n.; Trevor v. Wall, 1 T. R. 151; Coc v. McPherson, 15 L. J. Q. B. 283.

ffendants, and in order that complete relief may given (*x*). This rule has, moreover, to some tent, been modified by statute (*y*).

General rule.

Independently, however, of statutory exceptns, the Court itself had suffered the rule in me cases to be relaxed from the difficulties ich a strict adherence to it would have occaned. Thus where there are several persons ving exactly similar interests, one may frently sue in behalf of all, as in administration its (*z*). So, too, if the number of defendants in e same interest is very numerous, the Court ill sometimes allow some to be selected as presentatives of a class (*a*).

Relaxed where parties of one class numerous.

Subject to these modifications, the general le requires that persons having concurrent ghts with the plaintiff should either directly indirectly, in the mode above mentioned, made parties to the suit, but they need not, at law, join as co-plaintiffs (*b*), though by reising to do so they may, in some cases, render emselves liable to bear their own costs, whatver be the issue of the suit. Where a plaintiff, beneficiary under a settlement, claims a partilar estate, as an estate for life, it is necessary id sufficient to bring before the Court all the eneficial interests down to and including the rst estate of inheritance (*c*). If a contingent mainder vests pending a suit, the new remainderan must be made a party by an order of revivor id supplement (*d*).

Parties having concurrent interests with plaintiff.

A second consequence of the general rule is, at all persons against whom the defendant ould have a remedy over, ought to be before e Court, in order that the equities between the

Parties jointly liable with defendant.

(*x*) Hare v. London and North Western Railway Company, & H. 252; Daniel (4th edit.), 187.
(*y*) See 15 & 16 Vict. c. 86, s. 42, app.
(*z*) See *post*.
(*a*) Harrison v. Stewardson, 2 Ha. 530; Holland v. Baker, Ha. 68.
(*b*) Wilkins v. Fry, 1 Mer. 244.
(*c*) Reynoldson v. Perkins, Amb. 564; Lloyd v. Johnes, 9 s. 37.
(*d*) Ord. X., r. 1.

defendants may be adjusted (*e*). It is, however, somewhat of an injustice to the plaintiff, to compel him to wait for his remedy, in order that a defendant, who is liable to him *in solidum*, may more easily obtain his rights against another. Accordingly, this rule has been greatly modified by the Consolidated Order VII., rule 2, which provides, that where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto, but the plaintiff may proceed against one of the persons severally liable. This is in substance the same as the 68th section of the 9 & 10 Vict. c. 95, which enacts, that when any plaintiff shall have any demand recoverable under this Act, (see 19 & 20 Vict. c. 99, s. 21,) against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process, and judgment may be obtained, and execution issued, against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued, or may not be within the jurisdiction of the Court. The section saves the right of contribution.

Cons. Ord. VII., r. 2.

The application of the rule to cases of breaches of trust is considered, *infra*.

In what Court proceedings must be commenced.] The 10th section of the Act prescribes the Court in which proceedings are to be taken. Proceedings which relate to (*g*) mortgages, charges, or liens on lands may be taken (*i. e.* commenced) in any County Court district in which some part of the property lies (*h*). Proceedings under the Trustee Acts, 1850 and 1852, may be taken in any district in which one of the petitioners *resides*. Administration suits or proceedings may be instituted either in the district where the deceased *had his last place of abode*, or in a district in which one

Mortgages, &c. of lands.

Trustee Acts.

Administration.

(*e*) Madox v. Jackson, 3 Atk. 406.
(*f*) See 19 & 20 Vict. c. 99, s. 21.
(*g*) See *ante*, p. 4, note.
(*h*) See *infra*.

the executors or administrators has *his place of* ...*de* (*k*). Petitions by executors, or administra- Petition under Sir G. Turner's Act. ...s, under Sir George Turner's Act (*l*), which is ...pecies of Trustee Relief Act, seem to come ...hin this rule (*m*). In suits for winding up, or dissolution and winding up of partnerships, Dissolution &c. of partnership. ...plaint must be filed in the district within ...ich the business of the firm was or is carried ...(*o*). If the business is carried on in more ...tricts than one, it would seem that the plaint ...y be filed in any one of such districts. Suits Specific performance, &c. ...specific performance, or for the delivery ...or cancelling of an agreement, may be ...tituted either in the district where the de...dant, or one of several defendants, resides, or ...any district in which he carries on business (*p*). All other suits may be instituted, and petitions Other suits and proceedings. ...esented in any district within which one of the ...fendants—under which term respondents to a ...ition are, it is conceived, included—resides or ...ries on business. This rule will apply to suits ...the execution of trusts, to petitions under the ...ustees Relief Act or Lord St. Leonards Act, ...d to those concerning the maintenance or ad...ncement of infants, and also to mortgages, &c., ...chattels or other personal estate (*q*).

By the 11th section the judge may, at any ...ge, transfer a cause or matter to another Court ...either it is apprehended of his own, or of a ...ally different circuit—in cases where it appears ...t the cause or matter can be more conveniently ...osecuted in that other Court. The word ...onveniently" has reference to the administra...n in the particular cause, not to the convenience ...the general body of suitors or of the judge (*r*).

Filing and service of plaint.] The plaint is ...d by delivering it at the registrar's office, who ...orses upon it a memorandum of the day of

(*k*) See *infra*. *Quære*. Whether any difference is intended ...ween a residence and a place of abode.
(*l*) 13 & 14 Vict. c. 35, ss. 19—25.
(*m*) See *infra*.
(*o*) See Davis, pp. 18, 22.
(*p*) See *infra*. (*q*) See *infra*.
(*r*) Young v. Fernie, 1 De G. Jo. & Sm. 353.

the filing. Together with the plaint, as many copies must be delivered as there are defendants. These copies will be stamped with the seal of the Court, having been, it is presumed, first compared by the registrar or other proper officer with the filed plaint (*s*). After being so stamped, they will be delivered together with the summonses to the bailiff (*t*). Service of the summons and copy plaint will be effected by him in the usual way, and he will indorse upon his copy summons a memorandum of such service.

Service in foreign district.

If a defendant is intended to be served out of the district of the Court, the registrar will, unless the judge of the home Court otherwise orders, transmit to the registrar of the foreign Court by post the sealed copy plaint with the original summons, and a copy thereof, and a letter in the form given in the schedule to the rules of 1857. Service will then be effected by the bailiff of the foreign Court, who will return the copy summons indorsed with an affidavit of service through the registrar of the foreign Court to the registrar of the home Court.

Security for costs.] A plaintiff or petitioner not appearing to have a permanent residence in England, or mis-stating his residence, and a next friend of a married woman not being a substantial person, may be required to give security for costs (*v*).

Amendment.] The 13th Order provides, that the judge may, *at or during the hearing*, and before a final decree or order is made, exercise all powers of amendment mentioned in 18 & 19 Vict. c. 108, s. 57, so far as the same are applicable to proceedings in equity, and also all the powers and authorities of a judge of the High Court of Chancery.

No amendment before hearing.

It is to be observed that the judge has no power of amending or permitting amendments *before*

(*s*) Ord. I., r. 6; Ord. XXIII., r. 2.

(*t*) Ord. I., r. 9.

(*u*) As to service, see C. C. Orders, 1857, rr. 21—28; C. C. Rules, 1863, r. 5.

(*v*) Knight v. De Blaquiere, Sau. & S. 648; *Re* Norman, 11 Beav. 401; Barclay v. Gundry, 1 Kee. 53; Smith v. Etches, 1 H. & M. 711.

e hearing. The machinery of amending bills lays an important part in Chancery proceedings, being the mode in which a plaintiff introduces resh allegations corresponding to a new assign-ient or replication at law. A plaintiff is per-itted to obtain before answer any number of rders of course to amend, and after answer one rder of course, and further leave to amend is adily obtainable *ex parte* on an affidavit shew-ie *bona fides* of the plaintiff. Thus, it often appens in a foreclosure suit, that the defendant's nswer discloses the existence of another remem-rancer, or of a settlement. The plaintiff there-pon amends his bill, making the other incum-rancer, or the trustees of the settlement, parties. n the County Court such amendments can only e made at the hearing by the special leave of ie judge.

Service of parties added by amend-ment.

The orders and rules contain no provision for erving parties thus added by amendment, and ie direction of the judge should be taken on the oint.

It would seem, however, that under the 13th rder, the judge may, at the hearing, give all uch powers of amendment as he thinks fit. In ie Court of Chancery the plaintiff is generally llowed to make the record in the existing suit omplete as to parties, but is not permitted to nake a new case against an existing defendant (*w*).

Costs when leave given to amend.

f the Judge grants leave to amend, the costs of ie day will be in his discretion, but the general ule is, that a party obtaining an indulgence nust pay the costs of it (see *infra*).

Defendant's statements.] Order II. prescribes ie mode in which the defendant may avail him-elf of any defence. It must be read in con-unction with s. 76 of the 9 & 10 Vict. c. 95, which provides that a defence of set-off, infancy, overture, statute of limitations, or discharge as bankrupt or insolvent, shall not be allowed, nless the defendant has given notice of his in-ention to avail himself of it. The regulations

Special defences, 9 & 10 Vict. c. 95, s. 76.

(*w*) Watts v. Hyde, 2 Ph. 406.

as to notice are contained in the rules of 1859, rr. 66—73.

Defences of the kind just referred to are in general required to be set up in the Court of Chancery by plea or answer, though the Statute of Frauds and of Limitations may, where the bill discloses all the facts which the defendant relies upon, be taken advantage of by demurrer, and a defence of set-off not covering the whole claim of the plaintiff can always be raised in taking the account. But in claims—the practice in which will not improbably be often referred to in County Court cases—the defendant was allowed to avail himself of any defence that came out in the evidence (*y*). But for the enactment just referred to, it would seem that this would be competent to a defendant in the County Court. It is conceived, therefore, that a defendant relying upon any of the special defences above mentioned, will only be required to give notice of his intention to raise it, and not be required also to raise it by his statement in the nature of an answer. And it will be observed that the defendant must put in his statement within eight days after service, *i. e.*, on the fifteenth day after filing at the latest, while he can give notice of a special defence up to five days within the hearing, so that the time for sending in notice will never expire till the twenty-fourth day from filing. A set-off, not barring the entire right to a decree, will be available in the registrar's office.

Notice of special defence sufficient without pleading it.

Under Order XXIII., r. 18, the judge may enlarge the time for defendant to put in his statement.

It will be observed that the important power of compelling the defendant to make discovery upon oath, has not been granted to the County Courts, even as to documents. Where a plaintiff is able to shew himself entitled to a decree, Order VI., r. 2, will enable him to obtain from the defendant all such discovery as may be necessary

No discovery from defendant in County Court before hearing,

(*x*) Wood v. Midgley, 23 L. J. N. S. 535.
(*y*) Sneed v. Sneed, 20 L. J., Ch. 630.

r working out the decree (*z*). But in the Court Chancery an inquiry is never granted as to a int that goes to the root of the plaintiff's case ee *ante*, p. 15); and it seems, therefore, that if e plaintiff's case rests upon facts within the east of the defendant, it can only be established calling the defendant at the hearing as the aintiff's witness. Before the hearing, the aintiff cannot even compel the defendant to scover the documents in his possession relating the plaintiff's case. And, as already remarked, e plaintiff has no means before hearing of nending his plaint, and meeting new facts rought to light by the defendant's voluntary atement. These circumstances must be borne mind by the practitioner in considering whether suit is proper to be instituted in the County ourt.

In the Court of Chancery the defendant can otain discovery from the plaintiff before the earing, but in the County Court he has no such ower. This may often afford a good reason for moving the plaint by *certiorari* bill, or under ct. 3 of the principal Act into the former Court. nor from plaintiff.

As we have just observed there is nothing nabling the plaintiff to call upon the defendant efore the hearing to set out on oath a list of ie documents in his possession, or *vice versâ*, and rder III., rr. 4 and 5, and the Form No. 15 pre- ppose that the documents required can be speci- ed or described. If, however, it happens that one arty is able to specify documents in the possession the other party, the latter must, by the terms of 5, produce them at the hearing, whatever be their ature. When produced, however, the Court is to eal with them and with the costs "as may appear ist." It is conceived that, if the document be ne which the party is privileged to withhold, the ourt will refuse to look at it, and that it will ke the party's oath (*a*), until impeached by Production of documents. Document privileged,

(*z*) After decree in an administration suit a creditor may quire the executor to make an affidavit as to documents relating his claim: McVeagh v. Croall, 32 L. J. N. S., Ch. 521.
(*a*) Mansell v. Feeney (No. 2), 2 Jo. & H. 320.

evidence *dehors* the document itself, as conclusive as to the character of the document, and that the party, improperly calling for production, will have to pay all the costs thereby occasioned.

or partially privileged.

It is conceived also that if a book of account, letter book, &c., be called for, the party will be entitled to present it to the Court, with such parts sealed up as he swears have no relation to the matter in question; and that, if it be a document partially privileged, he will be entitled to exhibit it with the privileged parts concealed.

DEFENCES OF A GENERAL NATURE.

Want of jurisdiction.] By the 9th section of the 28 & 29 Vict. c. 99, the Court if, at any time during the progress of the suit, it is satisfied that the subject-matter in question exceeds in amount or value £500, is bound to direct the suit to be transferred to the Court of Chancery. An objection to the jurisdiction on this ground may, therefore, be raised at any stage. As to the course to be adopted, if the excess comes out in the proceedings after decree, see Order XVIII.

Excess of value.

Release concludes the releasor, unless procured by fraud, &c.

Release.] A release under seal executed by the plaintiff is a bar to his right to sue, provided it cover the whole matter in respect of which he is suing, but if procured by fraud, surprise, or undue influence, or executed by all parties under a common mistake, the defendant will not be allowed to set it up (*b*). But a release is *primâ facie* a bar, and if the plaintiff desires to impeach it, he must shew the particular circumstances by reason of which he alleges that it ought not to be regarded. In Chancery he can do this by amending his bill; in the County Courts it seems only by stating the release as a pretence of the defendant, and charging that it ought not to preclude him, and stating, as evidence, the particular facts just referred to.

Plaintiff impeaching a release must shew particularly the circumstances of fraud, &c.

Deed on which plaintiff sues voidable.] We may

(*b*) Millar v. Craig, 4 Beav. 433; Phelps v. Sproule, 1 My. & K. 231.

remark that a plaintiff is entitled to have a deed upon which he sues considered as good till it is set aside. If, therefore, he states a deed which for any of the causes just mentioned is voidable, the defendant is driven to file a cross-bill to impeach it (*c*). But a suit to set aside a deed is not within the jurisdiction of the County Court. In such a case, therefore, the plaintiff will be entitled to recover, as if the deed were not voidable. But it is probable that the defendant will, in every such case, if it be intended to be *bonâ fide* set up, be allowed to have the suit transferred to to the Court of Chancery (*d*).

Defendant can only impeach a deed by cross-bill.

Account settled.] An account stated and allowed by the plaintiff, or as it is commonly called stated and settled, affords, where it covers the whole of the plaintiff's demand, a ground of defence similar to that founded on a release (*e*). As to its effect, where it does not cover the whole demand, and as to account generally, see *post*, p. 33.

It is said to be a rule of the Court of Chancery that an account cannot be taken advantage of by *plea*, unless it be in writing (*f*), but this rule, if it exists, seems inapplicable to suits in the County Court.

Whether a settled account must be in writing.

Accord and satisfaction.] An agreement or accord is no bar to a claim unless there has been satisfaction. It is the performance of the thing agreed upon that constitutes the satisfaction of the plaintiff's demand, and nothing short of that can be pleaded in bar. An agreement to accept a certain sum in lieu of all demands is therefore not a good defence, unless payment has been made (*g*).

Plea must allege facts shewing satisfaction.

Former decree.] A decree of a Court of competent jurisdiction is, in the absence of fraud, a

(*c*) Acaster v. Anderson, 19 Beav. 161; Jacob v. Richar 8 Beav. 300.
(*d*) 28 & 29 Vict. c. 99, s. 11.
(*e*) Taylor v. Shaw, 2 S. & Stu. 12.
(*f*) Ld. Red., 259.
(*g*) Brown v. Perkins, 1 Ha. 564.

bar to all future suits between the same parties touching the same matter. And a judgment *in rem* is conclusive against all the world. These remarks apply to judgments of foreign tribunals. But even a foreign judgment *in rem* will be disregarded if it appear on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations (*h*).

Foreign judgment.

Award.] A submission to arbitration, and an actual award in pursuance of such submission disposing of the questions raised in the suit, is a good defence (*k*).

The 17 & 18 Vict. c. 125, s. 11, enacts that whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them, or any of them, shall be referred to arbitration; and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them;—it shall be lawful for the Court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer,—upon being satisfied that no sufficient reason exists why such matters cannot be, or ought not to be, referred to arbitration, according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration,—to make a rule or order staying all proceedings in such action or suit, on such terms as

Reference to arbitration by judge.

(*h*) Simpson v. Fogo, 1 J. & H. 18, 1 H. & M. 195.

(*k*) Tittenden v. Peat, 3 Atk. 529; Routh v. Peach, 2 Anstr. 519, and 3 Anstr. 637.

o costs and otherwise, as to such Court or judge nay seem fit: Provided always, that any such ule or order may at any time afterwards be dis-harged or varied as justice may require.

As to a reference to arbitration made at the nearing by consent, see 9 & 10 Vict. c. 95, s. 77.

INTERLOCUTORY APPLICATIONS.

Payment, or deposit into Court.] Whenever the plaintiff can read from the defendant's statement before decree, or his evidence or accounts after decree (*l*), a clear admission that he holds, or in some cases an admission that he has held, an ascertained sum of money upon trust, a motion may be made for the defendant to pay the money into Court. In general, the plaintiff making such a motion must either be solely entitled to the sum he seeks to have secured in Court, or he and other parties before the Court must have the entire interest in it (*m*). But where some of the persons interested are not necessary parties by virtue of 15 & 16 Vict. c. 86, s. 42, payment into Court may be obtained without serving them with notice of motion (*n*). A person beneficially interested in an aliquot part of an ascertained sum is entitled, as of right, to have that part brought into Court, but the whole will not be ordered in, unless the course seems necessary to prevent its being lost, or there are other special circumstances (*o*). If, however, the right to the fund is contested, but all persons who possibly can claim it are before the Court, the plaintiff one of such claimants may move on his possible title (*p*).

Made on defendant's admissions.

In general all parties interested must be represented.

Plaintiff may move on possible title.

If the defendant by his answer or statement admit that a sum certain has come to his hands, but allege that he has made payments out of it,

(*l*) Seton, 62. Dan. 1226, 1305.
(*m*) Freeman v. Fairlie, 3 Mer. 29.
(*n*) Marryatt v. Marryatt, 23 L. J. N. S., Ch. 876.
(*o*) Hamond v. Walker, 3 Jur. N. S. 686.
(*p*) Richardson v. Bank of England, 4 My. & Cr. 171.

Defendant allowed to deduct payments out of the fund.

or chargeable upon it, he will be allowed on the motion to verify by affidavit, or it is conceived *viva voce*, the amount of the payments properly made, and will only be required to pay in the balance (*q*).

Where money is payable from one party to another under a decree, it must, in all cases, be paid into the County Court (*r*).

Depositing jewels, deeds, &c. with the registrar.

Chattels of value, but small bulk, such as jewels, or exchequer bills, bonds, foreign securities, &c., are sometimes taken under the care of the Court pending litigation or administration. In such a case, the proper order would seem to be to direct them to be placed in a tin box in the presence of the parties or their solicitors, and deposited in some bank with the privity of the registrar. Where necessary, an order should be added, allowing the registrar, or some other person, or one of the parties, access to the box, in order to tear off coupons, or otherwise obtain receipt of dividends, &c. (*s*).

Receiver.] A receiver is a person appointed by the Court to receive the rents and profits of land, or otherwise to take possession of property, or to receive and manage a business, in order that the fruits of the subject-matter so taken under the care of the Court may be preserved for the benefit of the parties really entitled to them. Thus, a receiver may be appointed of the personal estate of a deceased person pending litigation as to the grant of probate (*t*).

Receiver should be prayed for.

If it is desired to obtain the appointment of a receiver before the hearing, one must be specifically prayed for (*u*), notwithstanding Order V., r. 3, and a receiver cannot be appointed before the hearing on the motion of the defendant.

The possession of the receiver is the possession of the Court, and any person disturbing such

(*q*) Anon., 4 Sim. 359.
(*r*) 19 & 20 Vict. c. 108, s. 45.
(*s*) Seton, p. 60.
(*t*) See now 21 & 22 Vict. c. 77, ss. 70—72.
(*u*) Pare v. Clegg, 9 W. R. 216: *Quære*, whether the Court, on motion, can amend *instanter* by adding such a prayer. See *supra*, p. 15, note.

ossession, *e. g.*, a sheriff by levying execution s well as the execution creditor himself, is guilty f a contempt of Court. The proper course for person claiming an interest as a creditor or therwise, is to apply for leave to be examined *ro interesse suo*, or for leave to levy execution, ring ejectment, &c., notwithstanding the appointment (*v*).

Disturbing receiver a contempt.

Examination *pro interesse suo*.

Except under very special circumstances, a arty can only be appointed a receiver without alary (*w*). So also a trustee (*x*).

Party to suit receiver seldom allowed salary.

Neither a solicitor in the cause (*y*), nor the next riend of an infant plaintiff (*z*), will be appointed, s it is their duty to check the receiver's ccounts.

Solicitor or next friend of infant.

A receiver is often appointed on motion till urther order. In that case, care must be taken xpressly to continue the receiver on every subequent order, till it is intended to discharge im.

Receiver till further order.

A receiver is in general remunerated by a oundage, from ½ per cent. to 5 per cent., and egulated by the character of the duties. See urther as to receivers, Order XXII.

Receiver's poundage.

Injunction.] We have already mentioned that plaint filed to obtain an injunction must allege hat the plaintiff *threatens and intends* to do, or ontinue doing, some wrongful or inequitable ct, and must specifically pray for that injunction hich the plaintiff seeks to obtain. The various ases in which injunctions are obtainable, belong o the special part of the work. As an inunction can only be had if specifically prayed or, it is advisable to pray for one in all cases here there is any probability that it may be ecessary to apply for one, and this is the more

Injunction must be specifically prayed for.

(*v*) Russell v. East Anglian Railway, 3 Mac. & G. 104; See Defries v. Creed, 6 N. R. 17.
(*w*) Davis v. Barrett, 13 L. J., Ch. 304, and see Newport v. Bury, 23 Beav. 30, where a party was allowed a salary.
(*x*) Anon., 3 Ves. 515.
(*y*) Garland v. Garland, 2 Ves. Jr. 137.
(*z*) Stone v. Wishart, 2 Madd. 64.

necessary in plaints, as a plaint cannot be amended as readily as a bill. Possibly, however, the Court on motion might amend instanter by adding a prayer for the proper injunction.

Ex parte injunction when and how obtainable.

An injunction, in which term an order in the nature of an injunction is here included, may be moved for either upon motion, or in urgent cases and where irreparable mischief might ensue *ex parte*. In the former case, notice must be given at least seven days (*a*) before the sitting of the Court at which the motion is to be made (Order XIV.), but the judge can, under Order XXIII., r. 8, on application, allow shorter notice to be given.

As we have seen, an *ex parte* injunction can be granted by the judge wherever he happens to be. It can only be granted after plaint filed, and, except there are special circumstances requiring it, not after the defendant has appeared (*b*). The plaintiff must swear positively as to his right and title, and shew some overt art indicating an intention to invade them. Affidavits used on the motion must not have been sworn on an earlier day than that on which the plaint was filed, though on that day they may have been sworn before the actual instant of filing (*c*), and office copies must be in Court when the injunction is moved for (*cc*).

Evidence on motion *ex parte* for injunction.

Undertaking as to damages.

Injunctions before the hearing not *ex parte* are granted up to the hearing. But an *ex parte* injunction is frequently granted only to a fixed day, as till the next day the Court sits in the district. It is now the settled practice to require from the party in whose favour an *interim* injunction is granted or continued an undertaking to be answerable for such damages (if any) as the Court shall think fit to award to the party enjoined for the injury he sustains by being put under the injunction (*d*).

(*a*) *Quære*, Seven clear days.
(*b*) Aller v. Jones, 15 Ves. 605, Dan. 352.
(*c*) Francome v. Francome, 5 N. R. 289.
(*cc*) Elsey v. Adams, 2 N. R. 263.
(*d*) Wakefield v. Duke of Buccleugh, 6 N. R. 388; Tuck v. Silver, Johns. 218; Chappell v. Davidson, 8 De G. M. & G. 1.

The mode of perfecting the injunction is explained in Order XXII. As soon, however, as the fact of its being granted comes to the defendant's knowledge, he is bound by it, provided due diligence be used in perfecting it.

Other ex parte applications.] Order XII., r. 1, mentions other *ex parte* applications than those for injunctions, viz., applications to secure the possession of property; to obtain security from any person for monies in his possession; to enforce the deposit or payment of money into Court pending litigation, or the immediate sale of any goods or chattels, and the deposit or payment into Court of the purchase-money thereof. *Ex parte* applications under Order XII., r. 1.

An application to secure the possession of property must either be for a receiver or for an injunction. A motion for the appointment of a receiver can only be made in the Court of Chancery after notice to the defendant (*e*), unless the defendant is out of the jurisdiction, and cannot be served (*f*).

It is not the practice of the Court of Chancery to compel a person to give securities for monies in his possession, except possibly with the party's consent as a condition for not ordering him to pay money into Court.

Payment of money into Court always proceeds upon the admissions of the defendant, and notice of the motion must be given (*g*).

With respect to the immediate sale of goods and chattels, it is no doubt competent to the Court to order one in a case of necessity, but the authors are not aware of any case where an *ex parte* order to this effect has been made. In the present state therefore of the practice of the Court of Chancery, the practitioner cannot be advised to rely upon this order as applicable to any other case than that of an injunction. The Court will probably be entitled to issue orders in the nature of a writ *ne exeat regno*, which is granted for an *Ne exeat regno.*

(*e*) Metcalfe v. Pulvertoft, 1 Ves. & B. 183, per Sir J. Leach, arguendo.

(*f*) Tanfield v. Irvine, 2 Russ. 149.

(*g*) Dan. Ch. Prac., p. 479, vol. 3 (ed. 1).

equitable debt, and is often discharged upon the defendant giving security for the debt.

Effect of rders *ultra vires.*

It will not be forgotten that the rules, orders, and forms have not the force of the Act of Parliament, but depend for their efficacy entirely upon their being within the powers conferred by it (*h*). If, therefore, the Court of Chancery has never made orders in the nature of those just referred to, it is doubtful whether the orders and rules can vest an authority to make them in the County Court.

Evidence at hearing.] At the hearing it is necessary to prove so much only as entitles the plaintiff to a decree. Thus, in a bill to foreclose, evidence as to the items of the account between the mortgagor and mortgagee are improper; for it is of course, on proving the mortgage deed, and that something is due, to order the account to be taken. So also in a suit for an account against an executor, the mere fact of probate entitles the plaintiff to a decree, and if the executor admits that he has received assets, evidence tending to charge him with particular sums as items of the account, and to shew that he has in fact received more than he admits, cannot be gone into at the original hearing (*k*). The costs of affidavits, or other evidence as to these matters, will for this reason not be allowed. But if any special accounts, inquiries, or directions are asked for, some evidence must be adduced as a foundation for them (*l*). Thus, if a mortgagee admits that he has been in possession, evidence tending to charge him with wilful default should not be gone into at the hearing, for it is of course to take the account against a mortgagee in possession with wilful default (*m*). But if an executor admit possessing himself of the assets, it is not, of course, to charge him with wilful default, and therefore

(*h*) See Foley v. Maillardet, 1 De G. Jo. & Sm. 389; and compare Steele v. Stuart, 3 N. R. 291.

(*k*) Law v. Hunter, 1 Russ. 100; Walker v. Woodward, 1 Russ. 107.

(*l*) *Supra*, p. 14.

(*m*) Vide *infra*.

vidence of at least one act of wilful default
ust be given (*n*).

Attention must be directed to the 6th rule of Order III., making all deeds, &c. (*o*), prove themelves, unless objected to, and allowing the judge, n case of objection, to adjourn the hearing at the ost of the objector. And we may observe that re Court of Chancery often allows a cause to stand ver, with liberty to supply some slight defect in ne proof (*p*); but in that case the party obtaining ne indulgence must in general pay the costs of ne day. In Chancery these are fixed at £10, but is presumed that in the County Courts they must e taxed if this be required. Proof of documents. Supplying deficient proof.

Decree at hearing.] We have already referred o the difference between the original decree and he final decree, and have pointed out that while o more evidence ought to be adduced than is ecessary to entitle the plaintiff to the accounts, nquiries, and directions which he wants, it is ften necessary, where special directions or special nquiries are asked for, to give some evidence that heir result may possibly be favorable to the party sking for them. Inquiries, &c.

Accounts.] Some of the commonest directions n an original decree are those which concern the aking of accounts (*q*). By Order VI., r. 13, ust allowances are to be made in taking any acount without an express direction to that effect.

The mode of the defendant's availing himself f a settled account which affords a complete nswer to the suit has already been referred to, *nte*, p. 25. In general, however, an account is nly a partial bar to the plaintiff's claim, and fur- Settled accounts.

(*n*) Massey v. Massey, 2 Jo. & H. 728.
(*o*) As to wills, see 20 & 21 Vict. c. 77, s. 64.
(*p*) See Dan., 4th edit., p. 793, and Seton, p. 1117.
(*q*) The following forms may be useful:—Let the accounts, ated &c., be considered as primâ facie conclusive, with leave to ither party to shew any error therein. Accounts to be *primâ facie* conclusive.
Let the registrar enquire whether any account has been ettled between the parties, and in case it shall appear that any ccount has been so settled, the same is not to be disturbed, [*or* he same to be considered as, &c. (*as above*)]. Inquiry as to settled accounts.

nishes a ground for a special direction in the decree. Indeed, if it be merely suggested by the defendant's answer or statement, a direction will be inserted to inquire whether any account has been settled between the parties, and if so, not to disturb it (*r*). But unless a direction to this effect or in the form given in the schedule No. 25 is inserted in the decree, the registrar will have no authority to regard settled accounts (*s*), and the direction is not of course. The practice on this subject is very clearly expressed in the following remarks of Vice Chancellor Kindersley (*t*):—

Inquiry as to settled accounts.

Direction in regard to settled accounts.

"I apprehend that the principles upon which the Court acts with regard to these questions are very simple and plain. If a defendant, being called upon to account, alleges and proves specifically a certain settled account,—alleges and proves that at a certain time the parties met, and either in writing or, specifically, by word of mouth, agreed that the result of their accounts was so and so, and that they were settled upon a certain day by a certain payment, the Court declares that to be a binding and settled account, and directs the account to be taken upon that footing. But if it be a case where the party does not allege and prove a settled account, but leads the Court to think there is a settled account, and states that there is a settled account, the Court does not direct the account generally, but gives a direction that in case it should appear in taking the account that any part of the account was settled, that settled account is not to be disturbed. That is the form in which the matter stands. The defendant then, taking the right to raise the question in Chambers, raises it in general at his own risk and at the peril of costs, the rule being that a party who has asked for an inquiry, and afterwards fails upon the result of that inquiry, *primâ facie* though

(*r*) Kinsman v. Barker, 14 Ves. 579. Buckeridge v. Whatley, 33 L. J. Ch. 649.

(*s*) Fitzpatrick v. Mahony, 1 Jo. & Lat. 84, and see Buckeridge v. Whalley, 3 N. R. 179.

(*t*) Patch v. Shore, V. C. K., 5 June, 1865, from the shorthand writer's notes of the judgment.

ɔt necessarily, pays the costs of the inquiry hich was directed for his advantage and be-ɔfit."

When settled account disregarded.

An account, though signed, will be disregarded the relative situation of the parties, or the man-ɔr in which the settlement took place, or the ature of an error proved, shew that the alleged ettlement ought not to be considered as an act inding upon the party signing, and that it would e inequitable for the accounting party to take dvantage of it.

Mode of plaintiff's meeting a settled account.

As a plaint cannot be amended by the plaintiff efore the hearing if he anticipates that an invalid ccount will be set up, he should introduce it by pretence, and charge that it is invalid, setting ut the facts which prove such invalidity.

Distinction between a release and a settled account.

A release under seal differs from an account tated in this: a release is a discharge of the arty released, and an acceptance of his accounts ight or wrong. It may be set aside or reformed ike any other deed. But if the defendant plead n account stated and signed by the plaintiff, the atter is not, even where there has been no fraud, bsolutely concluded by his signature, but will ɔe allowed on pointing out and proving some pecific errors to surcharge and falsify generally, he effect of which is to make the account only *rimâ facie* evidence against him.

Leave to surcharge and falsify

enures for the benefit of both parties.

Where leave is given to one party to surcharge nd falsify, the other party may do so too (*u*), and errors both of law and of fact may be set right ɔn such a permission (*v*).

Vouchers, &c. lost.

Vouchers, &c.] An account rendered by any ɔarty may, of course, be used against that party (*w*). Where by reason of the loss of books or vouchers, or for any other cause, the accounts cannot be taken n the usual manner, the Court may, by decree or ɔy subsequent order, give special directions as to mode of taking or vouching the account (*x*). Order

(*u*) 1 Madd. Ch. Pr. 144.
(*v*) Roberts v. Kuffin, 2 Atk. 112.
(*w*) Morehouse v. Newton, 3 De G. & S. 307.
(*x*) 15 & 16 Vict. c. 86, s. 54.

Books *prima facie* evidence.

VII., rule 3, directs, that in all accounts taken in the County Court, the account books shall be *primâ facie* evidence of the matters therein contained, unless the judge shall otherwise direct (*y*). In a proper case, leave to surcharge and falsify would be given.

Discovery after decree.

By Order VI., rule 2, the registrar has all necessary powers for carrying out a decree. Each party must, if required, make discovery as to the documents, &c., in his possession, and as to any facts within his knowledge, and necessary for the other party to know, in order to his obtaining the full benefit of the relief accorded to him. And in an administration suit, a creditor of the testator, though neither plaintiff nor defendant, may, after decree, with a view to establish his debt, obtain an order that the executor discover the documents in his possession relating to the creditor's claim (*z*). So also a defendant may, after decree, though not before, call for a discovery of documents upon oath, from the plaintiff or co-defendant (*a*).

Rules as to privileged documents and production.

The party producing will be allowed to protect privileged documents from production; if he produces them under a *subpœna duces tecum*, by his statement at the time of production, and if he produces them as a party on oath by the affidavit setting forth a list of them: in case any books are required to be produced, he has liberty to seal up upon oath all such parts as have no bearing on the matter in question. A party will not be required to produce at the registrar's office such books as are in daily use, but the other party, his solicitor, or agent, will be at liberty to inspect them at the owner's place of business, at such times, and after such notice, and subject to such conditions as the registrar may direct (*aa*).

As to discovery at the hearing, see *ante*, p. 22.

Sales by order of the Court.] Where incum-

(*y*) See Reeve v. Whitmore, 6 N. R. 314.
(*z*) McVeagh v. Croall, 32 L. J., Ch. 521.
(*a*) Hart v. Montefiore, 10 W. R. 97.
(*aa*) Hooper v. Gumm, 2 Js. & H. 602.

ered real estate is directed to be sold, the regis- Inquiry as to incum-brancers.
ar will have to inquire into the priorities of in-
umbrancers who consent to a sale (*b*).

The rules as to priorities of incumbrancers are
o be found in the portion of this work which
elates to mortgages.

The judge has power to fix reserved biddings, Powers of judge.
o direct deposits to be made, and to appoint per-
ons to receive the same, and to receive proposals
or sale by private contract (*c*).

No party to the suit can bid without leave of Parties bidding.
he Court being obtained (*d*).

An order may be made for substituting another Substituting sub-purchaser.
urchaser by consent of the original purchaser,
pon notice to the parties appearing, and an affi-
avit of no collusion, or under-bargain; and upon
he latter paying in the purchase-money (*e*); any
dditional price obtained by virtue of a sub-con-
ract, entered into before the certificate of the
esult of the sale becomes absolute (*f*), must
e for the benefit of the parties interested. *Secus*,
where the contract was bonâ fide not entered
nto till after the confirmation of the certifi-
ate (*g*).

The biddings may be opened by the Court Opening biddings.
pon the application of any person advancing
£10 per cent., or if the Court thinks proper a less
um, upon the sum at which the lot was
nocked down, and paying all expenses of such
pplication. It should be made before the regis-
rar's certificate of sale is confirmed (*h*).

If the title is bad, the purchaser will be dis- Costs of purchaser where title bad.
charged, and will have his costs relating to the
matter paid out of the fund in Court (*k*), and if
there be no fund will have them from the

(*b*) Seton, 1182, 1185.
(*c*) See Order of July 16, 1851; Cons. Order, 35, r. 61; Seton, 1185; Morg. 530.
(*d*) Elworthy v. Billing, 10 Sim. 98.
(*e*) Rigby v. Macnamara, 6 Ves. 515.
(*f*) See Ord. VIII., r. 4.
(*g*) Dewell v. Tuffnell, 1 K. & J. 324.
(*h*) Ord. VIII., r. 4.
(*k*) Reynolds v. Blake, 2 Sim. & Stu. 119.

plaintiff, without prejudice to the question how they are ultimately to be borne (*l*). And it is conceived that he is also entitled to the ordinary vendee's lien on the estate. See *infra*.

High bailiff, &c., not chargeable with auction duty.

The high bailiff, or other officer, may sell by auction under the decree of the Court, without taking out a license (*m*).

Whether in absence of express direction costs will follow the event.

Costs.] By the 88th section of 9 & 10 Vict. c. 95, it is enacted that the costs of any action or proceeding not otherwise provided for by the Act, shall in default of special direction abide the event of the action. The 4th rule of Order IV. provides that, upon the hearing of a suit in equity, the Court may make such order as to costs as it shall think fit. It does not seem clear whether in default of a special direction as to costs, the section above cited—which in terms refers only to the result of an action—will apply, or whether according to the practice of the Court of Chancery each party will have to bear his own costs. It will be better, therefore, that in every case the final decree should expressly dispose of the costs.

But however this may be, the County Court in dealing with costs will no doubt be governed by the principles prevailing in Courts of Equity.

Costs in equity in the discretion of the Court.

There costs are considered as entirely within the discretion of the Court, and indeed, in one case Lord Chancellor Hart spoke of "the testimonial of good conduct which the Court dispenses in awarding costs" (*n*). But these expressions seem much too strong. The general rule rather is that enunciated by Lord Westbury in *Bartlett* v. *Wood* (*o*), that "in contentious cases the costs of the litigation must be considered as following the result." And this rule applies not only to cases where the costs are payable by a party personally, but also to cases where the costs are payable out of a fund. In the case just cited, which was an

But in contentious cases generally follow the event.

(*l*) Smith v. Nelson, 2 Sim. & Stu. 557.
(*m*) 15 & 16 Vict. c. 87, s. 42.
(*n*) Armstrong v. Blake, 1 Moll. 178.
(*o*) 9 W. R. 817.

dministration suit, Lord Westbury intimated hat the plaintiff's next friend—the plaintiff being n infant—ought to have been made to bear the osts occasioned by his introducing into the bill nfounded charges of fraudulent dealing with he estate against the defendants the executors.

But, although such is the general rule, it is ubject to a great many qualifications. The najority of these are appropriately discussed nder each particular head. But those which artake of a general character are fitly mentioned n this place.

Unsustained charges of fraud.

In almost every case a party unsuccessfully setting up charges of fraud against another party, must pay all the costs occasioned thereby. *Bartlett* v. *Wood*, just cited, is a strong illustration of the application of the rule. Strictly speaking, this principle applies where the party unsuccessfully alleging fraud succeeds in the main (*p*), though in such a case the Court often, by reason of the difficulty of accurately apportioning the costs, contents itself with leaving each party to bear his own (*q*).

Offer or tender before or during suit.

In general, if a defendant before suit offer to the plaintiff the terms, and tender to him the total amount, to which he is justly entitled, the plaintiff will have to pay the costs (*r*). And if during suit he offer everything which the plaintiff is entitled to require, and tender any ascertained money demand and the costs hitherto incurred, and also submit to pay such costs as may be necessary to give full effect to the offer, the plaintiff, if he persists in going on, will not be allowed any additional costs (*s*). Thus, if it be a case in which the plaintiff is entitled to an injunction, the defendant must offer to submit to such injunction, and to pay the costs of obtaining it (*t*).

(*p*) Jones v. Ricketts, 10 W. R. 576.
(*q*) Cullingworth v. Lloyd, 2 Beav. 385.
(*r*) Williams v. Thomas, 3 Dr. & Sm. 29, 37; Burrell v. Dele vante, 31 L. J., Ch. 365.
(*s*) Colburn v. Simms, 2 Ha. 543.
(*t*) Geary v. Norton, 1 De G. & S. 12.

Party raising his case in a way unnecessarily expensive.

On the same principle, a party who wantonly raises his case in such a way as to occasion unnecessary expense, as, *e. g.*, a *cestui que trust*, who in a simple case institutes a suit to obtain the appointment of new trustees, where a petition would have sufficed, must pay at least the extra costs occasioned by his mode of proceeding (*u*), and he has been made to bear the entire costs (*v*).

But this rule applies only to cases in which it must have been clear *ab initio* that the less expensive mode of proceeding would be equally effectual, and equally beneficial to the plaintiff; and, therefore, a trustee entitled to a complete discharge is not bound to content himself with paying money into Court under the Trustee Relief Act, but may institute a suit, and he will be allowed the costs of it as between solicitor and client; see *infra* (*w*). As to the application of this rule to cases in which a suit instituted in the Court of Chancery might have been instituted in the County Court, see *ante*, p. 22, *ad fin.*

Laches of plaintiff.

Family suits.

Laches on the part of plaintiff in instituting his suit is material in regard to the question of costs (*x*). But in suits, as to the disposition of property between members of the same family, mere delay ought not, it has been said, to weigh strongly against the plaintiff (*y*).

Successful plaintiff eased by the suit must pay costs.

The plaintiff, though he obtain a decree, will have to pay the costs of a suit, which is solely for his ease and benefit. Thus, in *Hood* v. *Oglander* (*z*), which was a suit for specific performance, the plaintiff the purchaser had required the vendor to give an undertaking that he would invest the purchase-money in a certain way which the purchaser alleged was required by a will under which the vendor derived title. The defendant the vendor refused, and in the suit it

(*u*) See Wells v. Malbon, 31 Beav. 48; Bensusan v. Nehemias, 4 De G. & S. 381.
(*v*) Thomas v. Walker, 18 Beav. 521.
(*w*) Barker v. Peile, 5 N. R. 425.
(*x*) Lee v. Brown, 4 Ves. 362.
(*y*) See per Sir J. Romilly, M.R., Fielder v. Laver, 1 N. R. 189
(*z*) 6 N. R. 57.

as held that he was competent to sell and give lid receipts for the purchase-money without ving any undertaking. Accordingly, the plain-fs, though successful, had to pay all the costs.

Conversely, an unsuccessful plaintiff sometimes tains his costs, if there is an estate or fund in igation (*a*). As to this, see the Chapters on dministration and Trusts, *infra*.

If a plaintiff file a bill relying on an authority nich is overruled pending the suit, the bill will general be dismissed without costs (*b*). Law altered pending suit.

Appeal as to costs.] As costs depend upon the scretion of the judge, an appeal is only com-tent where the decision either proceeds upon presupposes some general ground of principle practice, *e. g.*, a mortgagee refused his costs in redemption suit was allowed to appeal (*c*). The le under consideration has, however, been tely much relaxed (*d*). Strictly no appeal as to costs only, except principle involved.

But where costs are charged upon an estate or fund an appeal will lie (*e*). So also it is said here costs are erroneously ordered to be paid by party personally, instead of being charged on estate or fund (*f*). Or costs payable out of a fund.

Revivor for costs.] In like manner there can be revivor for costs only (*g*), except where the costs ave been taxed (*h*), or are charged upon an estate fund (*k*), or ordered to be paid by a receiver in e cause (*l*). No revivor for costs. Exceptions.

Costs payable out of a fund are ordered to be aid to the solicitor directly. If they are payble to a firm, the order usually directs them to To whom costs out of a fund are paid.

(*a*) Westcott v. Culliford, 3 Ha. 274; Wedgwood v. Adams, Beav. 103.
(*b*) Sutton Harbour Railway Company v. Hichens, 1 De G. & G. 167.
(*c*) Norton v. Cooper, 5 De G. M. & G. 728.
(*d*) Menzies v. Connor, 3 Mac. & G. 648.
(*e*) Chappell v. Purday, 2 Ph. 227.
(*f*) Bagot v. Bagot, Dan. Ch. Pr. 1114, n.
(*g*) Andrews v. Lockwood, 15 Sim. 153, 2 Ph. 339.
(*h*) Lowten v. Mayor of Colchester, 2 Mer. 113.
(*k*) Jenour v. Jenour, 10 Ves. 562; Kemp v. Mackrell, Ves. 579.
(*l*) Betagh v. Concanen, Ll. & G. temp. Plunket, 355.

be paid to "Messrs. A. B., C. D. and E. F., or to any or either of them" (*l*).

Cost of disclaiming defendant.] Where a defendant disclaims a distinction must be made between the case in which the defendant, at the time of filing the plaint, neither had nor claimed any interest in the subject-matter of the suit, and that in which he originally had an interest which he resolves to give up. In the former case, the defendant never was a proper party to the suit, and is entitled to be dismissed with costs. In the latter he should put in a disclaimer, and expressly consent to be dismissed without costs. He will then be entitled to his subsequent costs (*m*), and the plaintiff should, therefore, move as soon as possible to dismiss him without costs up to and including the putting in of the disclaimer, and with the costs of the motion (*n*).

Costs of issues.] It seems that where issues are directed, a party succeeding in any particular issue is entitled to the costs of that issue, however the general costs are borne (*o*).

Costs of motions.] The general practice as to the costs of interlocutory applications was stated by the registrars in reply to an inquiry by Sir John Leach to be as follows:—

Sir J. Leach's rules.

First, that the party making a successful motion is entitled to his costs as costs in the cause, but the party opposing it is not entitled to his costs as costs in the cause.

Second, that the party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing it is entitled to his costs as costs in the cause.

Third, that when a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause (*p*).

(*l*) Seton, 92.

(*m*) These rules are laid down in Ford v. Lord Chesterfield, 16 Beav. 516, and see Bellamy v. Brickenden, 4 K. & J. 670. Gibson v. Nicol, 9 Beav. 403.

(*n*) Talbot v. Kemshead, 4 K. & J. 93; Gowing v. Mowbray, 2 N. R. 384.

(*o*) Prevost v. Bennett, 2 Pr. 272; see, however, Weatherley v. Ross, 1 H. & M. 349.

(*p*) 1 Sim. & Stu. 759.

In the Court of Chancery, the costs are regulated these rules if the order is silent. It appears t a stranger moving in a suit *pro interesse suo* ist, in any event, pay all the costs of the mo- n (*q*).

Stranger moving.

The principal exception to Sir J. Leach's rules curs where a party obtains an indulgence on tion. Thus a party moving to suspend the ecution of a decree pending an appeal in gene- pays the costs (*r*). So also if he move to defer e hearing in order to supply evidence (*s*).

Staying proceedings pending appeal.

Hearing deferred to supply evidence.

If the Court directs the costs of a motion to be served, it is desirable, by the terms of the order, reserve them till the hearing *or further order*, r if reserved merely till the hearing they can- t be disposed of if the suit is not brought to a aring (*t*). If reserved costs of motion are not pressly mentioned in the decree at the hearing, ey are lost, as the order as to costs of suit does t include them (*u*), and they cannot be asked r under liberty to apply (*v*).

Costs reserved.

Where further consideration is adjourned, the uestion of costs is reserved without express men- on (*w*).

Where costs are given generally by the de- ee, the costs of subsequent proceedings are in- uded (*x*); *secus*, if they are given only up to e hearing. The Court rarely disposes of costs l further consideration, except where some art of the plaint, or some of the defendants, are smissed, or an improper defence has been set o (*y*).

"Costs of suit" include costs after hearing.

Costs generally not disposed of till further consideration.

Enforcement of decrees.] As to the general ode of enforcing decrees and orders, see Order VI. With respect to orders in equity for the

(*q*) Ponsardin v. Peto, 3 N. R. 237.
(*r*) Topham v. Duke of Portland, 1 De G. Jo. & Sm. 603.
(*s*) Douglas v. Archbutt, 23 Beav. 293.
(*t*) Rumbold v. Forteath, 4 Jur. N. S. 608.
(*u*) Gardner v. Marshall, 14 Sim. 477.
(*v*) Kendall v. Marsters, 2 De G. F. & J. 200.
(*w*) Seton, 57.
(*x*) Quarrell v. Beckford, 1 Mad. 286.
(*y*) Seton, *loc. cit.*

Judgment debtor summons.

payment of *costs*, they seem within the words of the 98th section of the 9 & 10 Vict. c. 95, which by section 21 of the principal Act is to be considered as incorporated with the latter statute. But it may be doubted whether an order in equity for payment of money, not as costs, is an order for payment of "a debt or damages;" and therefore it does not seem clear whether the power of issuing a judgment summons on a decree exists.

Appeal.] The 18th section gives a general power of appeal, subject to the proviso that there shall be no appeal from the decision of the judge as to a question of value or locality, considered as a ground of jurisdiction. If the judge has not decided the question, in consequence of its not having been raised, this circumstance precludes an appeal, since, as it seems, the Court of Appeal will not listen to an objection not taken in the Court below (*z*).

No appeal as to question of value or locality.

The mode of appealing is regulated by Order XIX.

Whether order of transfer to another County Court can be appealed from.

The proviso at the end of the 18th section, that no party shall be authorized to appeal against the decision of a County Court judge, on the ground that the proceedings might or should have been *taken* in any other County Court, would seem, both from its language and from the context, to apply only to a decision giving the Court jurisdiction under s. 10. It is apprehended, that there is nothing to prevent an order of transfer made under s. 11 being appealed from (*a*), except the general principle of the Appellate Court in Chancery, not to vary an order which is in the discretion of the Court below, *e. g.* the nomination of a particular person as receiver; and as to this see *Young* v. *Fernie* (*b*), where an appeal from the exercise of a power conferred in similar words by the 25 & 26 Vict. c. 42, s. 2, was heard without objection.

(*z*) Yorke v. Smith, 21 L. J. N. S. Q. B. 53.

(*a*) There would seem to be no appeal from an order of transfer made under sect. 3.

(*b*) 1 De G. Jo. & Sm. 353.

The right to bring a *certiorari* bill does not seem to be restricted by the limitations placed on the power of appeal. Parties may agree beforehand that the decision shall be final (*c*), and there can be no appeal where the judge has made an order by consent (*d*).

Appeal does not stay proceedings.

In accordance with the practice of the Court of Chancery, Order XIX. provides (*e*) that the pendency of an appeal shall not, *per se*, stay proceedings. But it is almost of course to stay proceedings where the appellant might be irreparably damnified before the appeal could be heard (*f*). Thus the Court will, in general, suspend the sale of property (*g*), or the execution of the conveyance in a suit for specific performance (*h*), and the unsuccessful party will not, in general, be compelled to pay money over to the successful party, where it appears that there is a reasonable probability that he will not get it back again if the decree is reversed, except upon a security to refund, if required (*k*). On granting a stay of proceedings, the Court sometimes compels the applicant to bring money into Court, or otherwise puts him under terms (*l*).

The Act seems to contemplate an appeal only as to questions of law or equity. A *certiorari* bill might be sustained on grounds of fact as well as on grounds of law. See *ante*, p. 10.

Through inadvertence, as it seems, no appeal is given from the City Court; but it is conceived that a *certiorari* will lie.

It must be remembered that by the 18th section of the Act, the order of the Appellate Court is final: in other words, there can be no appeal from the decision of the appellate Vice Chancellor. Where, therefore, the question arising in the

(*c*) 19 & 20 Vict. c. 108, s. 69.
(*d*) Stewart v. Forbes, 1 M. & G. 137.
(*e*) Rule 3.
(*f*) Way v. Foy, 18 Ves. 452.
(*g*) Nerot v. Burnand, 2 Russ. 56.
(*h*) Gwynn v. Lethbridge, 4 Ves. 58.
(*k*) Way v. Foy, *loc. cit.*
(*l*) Monkhouse v. Corporation of Bedford, 17 Ves. 380.

matter of a small fund is, in consequence of a decision being sought as a guide in other similar cases, or by reason of its difficulty, or for any cause, of more than usual importance, it may be proper that the suit should be instituted in the Court of Chancery and not in the County Court, as in this way the decision of the Court of appeal in Chancery can, if necessary, be obtained.

Costs payable by appellant or respondent personally.

Costs of appeal.] It is, of course, impossible to say what rule will be adopted by the Vice Chancellor authorized to hear appeals as to costs. Where costs are payable by the appellant or respondent personally, and either of them succeeds entirely, or in every substantial point, it is not improbable that the Court will adopt the rule laid down by the Court of Common Pleas in *Schroder* v. *Ward*(*m*), and give costs to the successful party. It was formerly a general rule in the Court of Chancery, as it still is in the House of Lords, sitting as a Court of Appeal in equity, not to give costs against a respondent who unsuccessfully supported the decree of the Court below(*n*), but the rule no longer prevails on appeals in the Privy Council or the Court of Chancery (*o*). Where there is a fund or estate in litigation, and the appeal is brought on reasonable grounds, as, for instance, a real difficulty of construction, it is apprehended that the costs of all parties, or of some of them, will, if their conduct has been proper, be given out of the fund (*p*). Indeed, in the case of wills, it is a general rule, that the testator's estate pays for the difficulties created by the testator(*q*), and if this principle should be departed from on appeals from the County Courts, every administration suit in a case of difficulty will be brought in the Court of Chancery.

Will probably follow the result.

Secus as to costs payable out of a fund where there is a real difficulty of construction.

(*m*) 32 L. J., N. S. C. P. 150.
(*n*) Hamilton v. Littlejohn, 4 Cl. & Fin. 20.
(*o*) Collins v. Burton, 4 De G. & J. 618; Baring v. Harris, 5 N. R. 178.
(*p*) Earl of Bective v. Hodgson, 10 H. of L. 656; and see Vickers v. Bell, 3 N. R. 624; Stokes v. Heron, 12 Cl. & Fin. 203.
(*q*) Shuttleworth v. Howarth, Cr. & Ph. 228.

If the decree appealed from is varied in some bstantial particular, but not so far as to amount be substantially reversed, it seems probable, at no costs will be given on either side (*r*). Appellant only partially successful.

Proceedings under particular statutes.] In the eceding pages we have endeavoured to give an itline of the general practice of the Court of ıancery, so far as it is likely to be applicable to oceedings in the County Courts, or useful as a iide to the practitioner. But, besides its ancient ıd inherent powers, the Court of Chancery has quired various additional powers by statute; ıd to this head the jurisdiction under the Trus- e Relief Acts and the Trustee Acts is to be ferred. There is this material difference etween the inherent and the statutory powers, ıat the former can only be called into oper- ion upon a bill filed and a suit regularly stituted, while the Acts of Parliament confer- ng the latter provide, that it shall be exerciseable *petition* in a summary way. The petition should erefore be entitled in the matter of the Act by e authority of which it is presented, and also, to oid confusion, in the matter of the particular tate or fund which it concerns (*s*).

Transfer to the Court of Chancery.] It is fficult at present to lay down any general rule to the circumstances under which a County ourt suit will be transferred to the Court of hancery: one or two such cases have been ready suggested.

In addition it may be remarked that cases will metimes arise in which a suit properly insti- ted in the County Court, during its progress ecomes of such a nature that the County Court nnot adequately dispose of it. Under such rcumstances the suit will properly be transferred the Court of Chancery. Thus, when a trust nd is under 500*l.* a suit to repair a breach of ust is proper in the County Court. But, if

(*r*) This is the rule in the House of Lords; Torre v. Brown, H. of L. 555; Wallace v. Patten, 12 Cl. & Fin. 491.
(*s*) In re Law, 4 Beav. 509.

one of the defaulting trustees is dead, then unless assets are admitted no relief can be had against his estate, if it exceeds 500*l.* The plaint might therefore allege an admission of assets, and if that allegation was denied, the suit would have to be transferred. The same course would have to be adopted, if by reason of events occurring after the institution of the suit, as the death of a defaulting trustee, or of a purchaser after plaint filed for specific performance by the vendor, it would be necessary in any amended or supplemental proceedings to ask for the administration of an estate exceeding 500*l.*

So, if an infant is interested in assets or a trust fund, the subject of a County Court suit, but has other property so that the total amount of his fortune exceeds 500*l.*, it may be held that the County Court cannot deal with questions of his maintenance or advancement. See the Chapter on Maintenance and Advancement.

PART II.

SPECIAL PART.

CHAPTER I.

ADMINISTRATION SUITS.

urisdiction 51
reditor's suits generally . . 52
reditor's suit against Personal Estate
Course of Administration . 53
Plaint, Parties and Interlocutory Relief . . . 55
Defences 59
Decree 61
reditor's suit against Real Estate—Plaint and Parties . 62
Receiver and Injunction . 65
Defences 65
Decree 66
Jo suit by Executor or Administrator 67
Suits at instance of Heir, or Next of Kin 68
Suits by Legatees generally, and of the different kinds of Legacies 70
Suit by Pecuniary Legatee . 71
Questions of Construction . 72
Decree 74
Suit by specific Legatee . 75
Suit by residuary Legatee . 78
Suit to recover Legacy charged upon Land 79
Suit by Devisee 79
Suit by Creditor claiming, in consequence of Execution of Power 81
General Observations as to Defences 81
Questions as to Value of Estates as founding Jurisdiction in County Court . . . 84
Proceedings under Decree . 85
Registrar's Certificate . . 88
Further Consideration—Legal and Equitable Assets . . 90
Marshalling 92
Retainer 94
Abatement 95
Costs 96
Injunction against other Claimants proceeding after Decree 97

ADMINISTRATION OF ASSETS.

Jurisdiction.] The County Courts shall have and exercise all the power and authority of the High Court of Chancery. 28 & 29 Vict. c. 99, s. 1.

In all suits by creditors, legatees (whether specific, pecuniary or residuary), devisees (whether in trust or otherwise), heirs at law, or next of kin, in which the personal, or real or personal, and real estate against or for, an account or administration of which the demand may be made, shall not exceed in amount or value the sum of five hundred pounds. Clause 1.

In all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief [in such suits], or for stay of pro- Clause 8.

ceedings at law to recover any debt proveable under a decree for the administration of an estate made by the Court to which the application for the order to stay proceedings is made.

28 & 29 Vict. c. 99, s. 2.

In such suits the Judge of a County Court shall, in addition to his former powers and authorities, have, for the purposes of the Act, all the powers and authorities of a Judge of the High Court of Chancery.

Sect. 10, clause 3.

Proceedings for the administration of the assets of a deceased person shall be taken in the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode.

Creditor's suit.] The administration of the personal and real estate of deceased persons is peculiar to Courts of Equity.

Action at law by creditor.

Any creditor may sue an executor or administrator, and a creditor by specialty, in which the heir is bound, *e. g.*, a bond creditor may sue the heir or devisee in a Court of law, but such suit involves a simple issue, and no administration of the personal or real estate.

The executor or administrator, if he admits the debt, can only plead by way of defence that he has fully administered the assets, and if that issue is found against him, judgment is given out of the goods of the testator or intestate.

If the heir or devisee admits the debt and pleads no assets by devise or descent, at time of issuing the writ, if that issue is found against him, the judgment is given, not out of the assets of the testator only, but absolutely against the heir or devisee; but if the plaintiff replies that the defendant had lands and has sold them, the plaintiff can recover only to the value of the land sold as found by the jury.

Suit in equity by creditor generally involves administration.

The creditor who can obtain relief at law, if he sues in equity, cannot generally get relief without an administration of the estate against which he proceeds.

A single creditor may, indeed, sue for his single bt in Court of Equity against the executor or ministrator, and upon the debt being proved or mitted the plaintiff gets a decree for payment. his is equivalent to a judgment at law (*a*), but s better course is to sue at law, as the executor ay, pending the suit, pay debts of an equal ture (*b*), which he cannot do at law after the ue of the writ (*c*). Suit by a single creditor.

A single bond creditor cannot sue for his single bt against the heir or devisee, but an account will directed of all other the bond debts of the testate or testator, that is to say, an administration of the estate will be directed (*d*).

If the decree in a suit by a single creditor for s single debt against the executor or administrator directs an account of the debt, it does not nfer any priority (*c*), nor can the plaintiff obtain injunction or receiver (*e*), and, consequently, ngle creditor's suits are much out of use, and a creditor, even prosecuting his claim against the personal estate only, sues on behalf of himself and l other creditors, and an administration of the tate is directed.

A creditor proceeding against the real estate not allowed to do so without also proceeding ainst the personal estate, an account of which and yment out of which is first directed before the al estate is applied. This arises from the rules tablished by Courts of Equity, as to the order of lministration of assets. In creditor's suits against real estate the personal estate must be administered.

Course of administration in creditor's suit.] The der for the application of the several funds able to the payment of debts is as follows (*f*):— Order in which the assets are applied in payment of debts.

1. The general personal estate not expressly or by implication exempted.
2. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it be so limited.

(*a*) Perry v. Phelips, 10 Ves. 34.
(*b*) Attorney General v. Cornthwaite, 2 Cox, 45.
(*c*) Anon., Salkeld, 153.
(*d*) Perry v. Phelips, *ubi sup.*
(*e*) Ponsford v. Hastley, 2 Jo & H. 736.
(*f*) Jarman on Wills, vol. 2, p. 526.

3. Estates which descend to the heir.
4. Real or personal property, devised or bequeathed, charged with debts.
5. General pecuniary legacies, *pro ratâ*.
6. Specific legacies and real estate, specifically devised, are liable (*g*) *pro ratâ*.
7. Real and personal property which the testator has power to appoint, and which he has appointed by his will.
8. Mortgaged real estate is the primary fund for payment of the mortgage debts of a testator or intestate dying after 31st December, 1854.

A simple contract creditor has no remedy except under the statute 3 & 4 Wm. 4, c. 104, against the real estate, and that remedy is confined to Courts of Equity.

Suit in equity by legatee involves administration.

A legatee, specific, pecuniary, or residuary, could, prior to the County Courts Act, 9 & 10 Vict. c. 95, claim his legacy only in a Court of Equity or the Ecclesiastical Court; the decree being, except the defendant admitted assets for the payment of the legacy, if pecuniary, or assented to the delivery of the legacy, if specific, for the administration of the personal estate.

Admission of assets not advisable.

An executor can very rarely be advised to admit assets at the suit of a legatee or creditor, and an administrator as rarely at the suit of a creditor, as, generally speaking, an admission of assets to one creditor is an admission of assets to all creditors in the same or a higher degree, and an admission of assets to a legatee is an admission of assets to all legatees and all creditors.

Constructive admission of assets.

If the executor or administrator has, by payment to the legatees or next of kin, or of duty upon their succession, or in any other manner admitted assets, there arises a personal liability to pay, and the Court orders payment without directing the accounts.

(*g*) The Court of Appeal has not yet decided whether a residuary devise is, since the Wills Act, liable before specifically devised estate. The decisions of the other Judges of the Court of Chancery are conflicting; see Dady v. Hartridge, 1 Dr. & Sm. 236; Rotheram v. Rotheram, 20 Beav. 405; Clark v. Clark, 6 N. R. 86; Rodhouse v. Mold, 6 N. R. 287.

The tendency of modern decision is, however, t to make payment by an executor to legatees thout knowledge of a debt admission of assets, though such payment will not be allowed in a editor's suit as against the creditor (*h*).

Plaint—Parties.] The jurisdiction of equity ing thus established in the case of creditors nd legatees claiming against the personal estate, e form of their proceeding is to be considered.

Ordinary form of plaint against an executor or administrator.

A creditor's plaint must be filed against the xecutor or administrator; if the legal personal epresentative is a married woman her husband ust be made a party with her. The ordinary plaint given in the Forms (No. 4.) But it will be proper ask that the estate be administered on behalf of laintiff and all the other unsatisfied creditors (*i*), nd it should not say that the defendant has pos- ssed himself of "the personal estate" (*k*), as the efendant will not admit that; but it should state nat he has possessed himself of some portion of ne personal estate, which will involve only the ommon decree.

An administration decree cannot be made until a personal representative is constituted.

Until there is a legal personal representative a reditor cannot get a decree for administration (*l*). Ie can apply for administration himself, but, nless six months have elapsed since the death of he debtor, he will not be allowed his costs of uch proceedings by the Court of Probate, if the arty entitled to take out probate or administra- ion in priority to him, on citation, gets constituted egal personal representative.

The creditor can, however, file a plaint against n executor alleging that he has proved the will, nd probate before the hearing will be sufficient.

A creditor may file a bill against an executor, *le son tort*, seeking an account of what he has

(*h*) Official Manager of Newcastle Banking Company v. Hymers, 22 Beav. 367.

(*i*) See Chancery Orders, 1850.

(*k*) See the form, No. 4.

(*l*) Penny v. Watts, 2 Phillips, 149; Creasor v. Robinson, 14 Beav. 589. The form of plaint by next of kin (Form No. 4) might lead the practitioner to assume the contrary. Lowry v. Fulton, 9 Sim. 104.

Interlocutory relief before a personal representative is constituted.

Payment into Court.

Receiver.

received, and payment into Court, but before a decree can be obtained in such suit the proper legal personal representative must be made a party.

Although there is no legal personal representative a creditor may file a plaint for a receiver, and he will obtain an order for a receiver, and an injunction to restrain any person from receiving who is intermeddling with the estate, and this notwithstanding the power of the Court of Probate under 20 & 21 Vict. c. 77, ss. 70, 71.

If the deceased died intestate, such an order will be as of course, and the creditor will be allowed his costs; the defendant will be the person, whoever it is, that is interfering with the assets.

If the deceased died leaving a will, appointing an executor, and there is a contest in the Court of Probate as to the grant of the probate, a receiver will be appointed, for there is no person having power to give a legal discharge, unless the will is established.

If probate has been granted, and there is a suit to recall it, a receiver will not necessarily be appointed. The acts of the executor are good, until the probate is actually recalled by virtue of the 20 & 21 Vict. c. 77, s. 77. But as the first step in such suit is the ordering the probate into Court, and the executor cannot recover in any action or suit, the assets of the testator, without production of the probate, if there are such outstanding assets, which, by reason of the probate being in Court, cannot be recovered, the Court of Chancery will appoint a receiver.

15 & 16 Vict. c. 86, s. 44.

It seems that the 15 & 16 Vict. c. 86, s. 44, by which the Court may proceed in any suit without representative of deceased person, or may appoint one, does not apply to suits where the object is to administer the estate of the deceased person. It is equivalent only to an administration *ad litem*.

Special form of plaint against

If the executor or administrator is not amenable to process, or the executrix or administratix

s a husband, who is resident abroad, or luna- personal representative.
(*n*), or if the executor or administrator is insol-
nt (*o*), has wasted or misapplied the property
the deceased, the plaint must state these facts, Injunction and receiver.
l pray for an injunction to restrain him from
covering the assets, and for a receiver of them.

If the executor is to be charged with negli- Account of assets not recovered by wilful default.
nce in not recovering property of the testator,
ase must be made for this in the original plaint,
if at the hearing the common decree for
count be taken, that is, that the executor or
ministrator account only for what he has
ceived, he cannot be charged for what he by
wilful default omitted to receive, that is, for
gligence in consequence of any facts coming
t upon the taking the usual accounts.

On the other hand, although it is believed that Interest on balances in executor's hands.
e executor has improperly kept balances in his
nds, it is not prudent to mention them in the
ginal plaint, as he can be charged with interest
these balances on the chief clerk's certificate.
stated in the plaint, and not noticed on the
cree, it must be considered as abandoned and
not be revived after the decree.

Not only may any creditor, who is a creditor at Creditor in equity only.
v, file a plaint, and creditors also who are creditors
equity only, as, for example, a creditor by reason
a breach of trust committed by the deceased (*p*),
l a plaint may be filed by creditor having
bitum in præsenti solvendum in futuro (*q*).

The form (No. 4, Administration) by creditor, di- Creditor holding mortgage security.
cts the plaintiff to state the nature of debt and
urity, if any. This must mean merely the
curity affecting the general assets, as promissory
te, bill of exchange, bond or covenant, and not
security over or affecting specific property; a
editor holding such security need not state it (*s*)

n) Yetts v. Palmer, 2 N. R. 255.
o) Utterson v. Mair, 2 Ves jun. 95.
p) Cresswell v Dewell, 3 N. R. 148.
q) Seton, p. 48.
s) He can prove for his whole debt and use his security afterds; Mason v. Bogg, 2 M. & C. 443; Tuckley v. Thompson, . & H. 126.

unless he files a plaint for realising it, and also for administering the general estate as he may do.

Such a plaint must ask for a sale of the mortgaged property, and for payment out of the produce of the sale of the plaintiff's principal, interest and costs of suit, and if there is a deficiency, the plaintiff must pray, on behalf of himself, all other creditors, that the personal and other real estate of the mortgagor may be administered (*t*).

A decree in terms of this prayer will not authorise an injunction against another creditor's action or suit (*u*).

Claim by devolution from original creditor.

If the original creditor of the deceased is not the person prosecuting the plaint, the devolution of the debt must be traced. Such devolution may be either a devolution at common law, as upon death or bankruptcy, or a devolution in equity only, as by assignment of a legal debt.

If the creditor's legal personal representative, executor, or administrator, sues the grant of probate, or letters of administration must be stated, and the probate or letters produced at the hearing, stamped for an amount exceeding the debt claimed.

The assignees in bankruptcy of a creditor must likewise set out proceedings in bankruptcy and his appointment.

The assignee of a debt may sue the debtor's estate in equity as much as the original creditor could, but it is held that the assignor, the original creditor, or his legal personal representative, if dead, must be a party (*v*).

Creditor also legatee.

If the creditor has any other title such as legatee or executor, these facts must be stated, and the proper relief applicable to that character asked after the relief proper to the character of creditor.

Debtor to estate made co-defendant

If the executor or administrator collude with a debtor to the testator's estate, or refuse, or wil

(*t*) Skey v. Bennett, 2 Y. & C. C. 405; Blair v. Ormond 1 De G. & S. 428.

(*u*) Ranken v. Harwood, on Appeal, 15 L. J. Ch. 498.

(*v*) Bruce v. Harrington, 2 Atk. 235; Pennington v. Bailey 6 L. J. N. S. Ch. 179.

ully omit to proceed against him, such debtor may be made a co-defendant. with executor.

In case the executor or administrator has made payments to legatees or next of kin, and is unable to make good such payments, by bringing their amount into Court, the legatee or next of kin is liable to the creditor for what he has received; and for the purpose of enforcing this liability must be made a defendant to the plaint.

Defence to creditor's suit.] The defence to a creditor's suit may be the ordinary defence to the claim of a debt at law, when the same rules must be followed as if it were a plaint on the law side of the County Court, or it may be peculiar to a Court of Equity.

Courts of Equity are now no longer allowed to send the plaintiff to a Court of law to try the validity of the debt at law; and of course this mode of proceeding would not have been applicable to a County Court, which is now a Court of law and equity.

A statute of limitation is a special defence, of which notice must be given: six years bar a simple contract, or twenty years a specialty debt (*w*). Breach of trust is a simple contract debt (*x*), unless trustee has signed a deed, declaring the trust (*y*), but in neither case are the statutes of Limitation a bar to the claim (*z*). Statute of Limitation.

The personal representative may plead that he has fully administered. An executor or administrator may plead payment of debts of equal degree, even after bill filed (*a*), or of inferior degree before bill filed and without notice (*b*), but notice is implied if it be a debt of record (*c*) duly registered where registration is competent. *Plene administravit.* Payment to creditors of lower degree before notice.

(*w*) 3 & 4 W. 4, c. 42, s. 2.
(*x*) Adey v. Arnold, 2 D. G. M. & G. 432.
(*y*) Wynch v. Grant, 2 Drew. 312; Wood v. Hardisty, 2 Coll. 22.
(*z*) Obee v. Bishop, 1 D G. F. & J. 137.
(*a*) Maltby v. Russell, 2 S. & S. 22.
(*b*) Hawkins v. Day, Ambler, 162.
(*c*) Searle v. Lane, 2 Vern. 89.

Payment to creditors of equal degree.

The order of payment of debts is stated subsequently.

An executor or administrator cannot generally, without passing his accounts in a Court of Equity, safely pay legatee or next of kin; if he passes his accounts, he is discharged from further liability, and the creditor is left to his remedy against the legatees or next of kin, but if the personal representative pay away the residue without passing the accounts in Court, he does it at his own risk (*d*).

Payment to beneficiaries by notice under 22 & 23 Vict. c. 35, s. 29.

If, however, the personal representative gives notices like those given by the Court of Chancery in an administration suit, he may, after the expiration of the time named in the notice, safely distribute the assets among the parties entitled thereto, and not be liable for the same to any person of whose claim he had no notice. Such payment of assets will be an answer to the creditor's suit (*e*).

Unsettled account.

If the defendant alleges that there is an unsettled account between the plaintiff and the deceased, or the defendant as the legal personal representative of the deceased, the account must be taken.

It seems that in a creditor's suit Lord Eldon made a decree for an account of what was due to the plaintiff, which is the common form when interest as well as principal is sued for, and that he said in taking such account the plaintiff's demand might be extinguished, and upon this ground he gave no priority to such a decree for account.

It has been held that if the defendant pleads an unsettled account he must file a cross bill, but this can only be when he wishes discovery, and as such discovery can be had if a decree is made; this seems no reason for allowing the statement of an unsettled account to be allowed as an objection to the plaintiff's suit altogether.

(*d*) Knatchbull v. Fearnhead, 13 M. & C. 122.
(*e*) Perry v. Philips, 10 Ves. 34.

Decree.] The claim of a creditor against the ersonal estate, whether represented by an ex- cutor or administrator, is followed by a decretal rder in the form given by Form 20. Creditors' suit against personal estate. Form of decree.

1. An account of what is due to the plaintiff and all other creditors.
2. An account of the funeral and testamentary expenses.
3. An account of the personal estate come to the hands of the defendant or to the hands of any other person by his order or for his use.
4. An enquiry what parts (if any) of the personal estate are outstanding and undisposed of.

The form states that the decretal order will, hen necessary in a creditor's suit, direct inquiry nd accounts for legatees, devisees, and heirs-at- aw and next of kin.

Inquiries as to legatees or next of kin in a suit y a creditor against the personal estate are un- ecessary, as the plaintiff claims from the personal epresentative by a higher title than these parties, nd are not inserted. The proper decree in a suit y a creditor being simply for the inquiries above, nd then for application of the personal estate in ayment of debts and funeral expenses in a due ourse of administration.

If the special cases which have been suggested re established against the executor the special elief will follow.

It is important to observe that at law an ex- cutor if he advances to the creditors the value f the assets he may retain them against a credi- or (*f*). The question of value is determined by he jury, but an executor shall not purchase the ssets and claim them against the benefi- iaries (*k*).

(*f*) Per Sir Thomas Plumer, M. R., in Cholmer v. Bradley, 1 . & W. 251; see p. 65. Per Lord Lyndhurst, C., Vernon v. hellusson, 1 Phillips, 466, see p. 470.

(*k*) Hall v. Hallett, 1 Cox, 134; Watson v. Toone, 6 Madd. 53.

Creditor's suit against real estate.] If the creditor seeks to proceed against the real estate various points are to be considered.

The real estate is not the first fund for the payment of debts and is not a fund for the payment of legacies at all, unless by the doctrine of marshalling; and no creditor claiming his debt against the real estate (except in the special case of real estate devised to exonerate personalty of which hereafter) can have relief against that estate alone, it being against the course of administration of a Court of Equity to pay debts out of real estate before the personal estate has been applied for that purpose. The executor or administrator must be made a defendant as well as the devisee or heir, and the account must be first of the personal estate and then of the real estate. If the executor will not prove on account of there being no personal estate administration cum testt. annexo must be taken out before the suit is heard.

Personal representative must be defendant.

If the devisee or heir is a married woman her husband must be also made a party.

If there is no legal representative of the testator constituted, it was held that an administrator *ad litem* was not a sufficient representative to enable the Court to administer the personal and real estate (*l*), that the Court could not avail itself of the provisions of the 15 & 16 Vict. c. 86, s. 44. But, if the plaint stated that the deceased died possessed of no personal estate, the difficulty might be got over.

Course to be taken if no personal representative.

It will be extremely important, in order to secure the intentions of the Legislature being carried out, that technical difficulties of this kind be not allowed by the Judges to stand in the way of the due payment of the debts of a deceased person out of his property.

A creditor seeking relief against the real estate as well as the personal estate must sue on behalf of himself and all other creditors of the same

(*l*) Groves v. Levi, 9 Hare, App. xlvii.

degree as himself, and this should be stated in the plaint, or it may be demurred to (*m*).

He need not sue on behalf of himself and all other creditors, or it might affect the question of costs. He is not bound to burden the fund which is liable to his debt with the costs of those claims which are of a less privileged character.

All persons interested in real estate must be parties.

The heir of an intestate was always liable to the payment of specialty debts in which the heirs were named to the extent of his assets by descent.

The devisee was made liable to the same payment jointly with the heir by the Statute of Fraudulent Devises, 3 & 4 Wm. & M. c. 14, and 6 & 7 Wm. 3, c. 14. The necessity for joining the heir with the devisee was done away by the stat. 1 Wm. 4, c. 47; and if the devise make a fair provision for the payment of debts, it is no longer fraudulent, and the creditor is excluded from the relief given by the statute, and must pursue the remedy given by the will.

Proceedings against heir if will is to be established.

The stat. 3 & 4 Wm. 4, c. 104, gave relief in equity to every species of creditor, but with a reservation of the right of creditors by specialty in which the heirs are bound; it was at first thought necessary to make the heir a party to suits by simple contract creditors, and establish the will against him, but it has been decided that it was not necessary to establish the will against him (*n*), nor to make him a party (*o*).

It is consequently no longer necessary to preface the decree in a creditor's suit by any declaration that the will is established, but it may be declared to be established against the heir if he is made a defendant for that purpose.

Upon the heir disputing the will its validity will be tried by the County Court, which has its jurisdiction as to wills raised from the amount spe-

(*m*) Ponsford v. Hartley, 2 Jo. & H. 736.
(*n*) Goodchild v. Terrett, 5 Beav. 398.
(*o*) Bridges v. Hinxman, 16 Sim. 71.

cified in the Probate Acts (*p*) of 300*l.* for realty to 500*l.* If it is not probable that the heir will dispute it, but it is wished to establish the will against him, it is sufficient to give him notice under the 64th section of the 20 & 21 Vict. c. 77.

If the testator has devised his property to trustees upon any trust, it is unnecessary, since the 15 & 16 Vict. c. 86, s. 42, rule 9, to make the *cestuis que trust* parties.

If the testator has devised his estates in strict settlement, it is sufficient if all persons having estates for life, and if the person in being who has the first estate of inheritance as tenant in tail or tenant in fee be made parties.

All persons who, under the will, have charges as annuitants or legatees upon the land under the will, if not through the medium of trustees for them, must be made parties to the suit.

Neither the Statute of Fraudulent Devises, nor the 3 & 4 Wm. 4, c. 105, apply when the will charges the real estate with debts, nor *a fortiori* when it is expressly devised in trust to pay debts.

If such devise be made to the exoneration of personal property, and if the creditor pursues his remedy against the real estate, thereby electing to have the remedy provided by the testator, he will hardly be bound to make the executor, a person representing the personal estate, a party to the suit.

Special form of plaint against devisee.

There are some special cases where special relief must be asked for.

Real estate sold.

A creditor is entitled to charge the devisee with the produce of any estate which he may have sold and not applied to the payment of debts, though he cannot charge a purchaser (*q*) for valuable consideration.

(*p*) See 20 & 21 Vict. c. 77, s. 34, and 21 & 22 Vict. c. 95, ss. 10, 11, 12.

(*q*) Purchase for money, Spackman v Timbrell. 8 Sim. 233; in consideration of marriage, Richardson v. Norton, 7 Beav. 112; Dilkes v. Broadmead, 2 Giff. 113.

If the produce of the real estate is not sufficient to pay the creditor he is entitled to an account of the rents and profits of the real estate received by the devisee; in this respect an ordinary creditor of a testator having a general charge on the land has higher rights than a mortgagee with a specific charge, who is not entitled to an account of the rents and profits received by the mortgagee or his heirs, unless, indeed, he claim as a creditor as well as mortgagee, and then only *pari passu* with other creditors of the same degree. Rents of real estate received.

But, in an ordinary case, the statement that the devisee or heir has possessed himself of the real estate (Form 11) should not be inserted, as it prejudices the defendant consenting to the ordinary decree.

Receiver—Injunction.] If the creditor seeks any special relief against the devisee or heir, as, for example, a receiver, and an injunction to restrain them from receiving the rents of the real estate, he must make a case for it on the pleadings.

As devisees or heirs are not liable for any rents, except, as we have before mentioned, the corpus has been applied and is insufficient, and then not generally for what they have neglected to receive, or with an occupation rent. If it appears doubtful whether the corpus of the estate will on sale produce sufficient to pay the creditors, a receiver should be granted, and the devisee or heir restrained from receiving the rents.

Defence to creditor's suit against real estate.] Every creditor entitled to payment out of the personal estate is entitled then to payment out of the real estate.

The ordinary modes of defence to the creditor's claim have been anticipated in treating of the defence to the claim on the personal estate; the heir or devisee may shew that he has paid to the value of the real estate devised.

It will frequently happen that the Statute of Limitations may be successfully pleaded by the personal representative of a deceased person, although Statute of Limitations.

it could not be pleaded by the personal representative.

The acknowledgment of a debt or payment of interest upon it by the personal representative does not keep it alive against the real representative; the payment of interest or a part of the principal of a promissory note by the executor or administrator will not prevent the devisee (if there is no trust to pay debts), or heir, from pleading the statute at the end of six years from the last payment or acknowledgment by the deceased (*r*).

Form of decree.

Decree.] The decretal order at the suit of a creditor against real and personal estate, after following the same course as that of the creditor against the personal estate, proceeds:—

And in case the intestate or testator's personal estate shall be insufficient for the payment of the debts and funeral expenses, let the following inquiry be made:—

1. The inquiry what real estate the intestate [or testator] was seised of or entitled to at the time of his decease.
2. The incumbrances affecting it with priorities of those who consent to a sale.
3. Direction for sale of the real estate.

And if it is anticipated that there will be a deficiency after a sale, the following may be probably added to the form given in the order.

In case the money to arise by the sale of the deceased's real estate shall not be sufficient to make good the deficiency of his personal estate (*s*).

An account of the rents and profits of the deceased's real estates come to the hands of the defendant, or to the hands of any other person by his order or for his use, or if the person in receipt is not ascertained, an inquiry who has been in receipt of the rents and profits of the deceased's real estate, since his decease, and if it shall appear

(*r*) Fordham v. Wallis, 10 Hare, 217.

(*s*) It is said in Stratford v. Ritson, 10 Beav. 25, that this is only done on further directions, but if the deficiency is apparent the relief should be given at once.

tt such rents and profits have been received by
y persons also parties to this suit.
'An account of rents, &c.
It should be observed that, although the
editor's suit is expressed to be on behalf of the
aintiff and all other creditors, or all other
editors of the same degree as the plaintiff, yet,
the defendants arrange with the plaintiff before
cree to pay him and to have the bill dismissed,
may be done (*t*), the plaintiff being *dominus litis*
til decree.
The proceedings under decrees for administra-
on at the instance of creditors, and the conse-
uences of a decree, we must consider when we
ve treated of the proceeding for administration
the suit of other parties.

Executor's or administrator's suit.] Neither exe- No suit for
itor nor administrator are mentioned in the Act administration in
persons who may sue for administration. County
Executors and administrators have power, under Court at
e 13 & 14 Vict. c. 35, s. 19, and 23 & 24 Vict. instance of
28, s. 14, to apply by motion *ex parte* to the personal
ourt of Chancery for an order directing an representative.
ccount of the debts and liabilities affecting the
ersonal estate, and for the payment of such debts
d liabilities in due course of administration.
he jurisdiction to make this order is assumed
be conferred upon the County Court, perhaps
being a Trustee Relief Act; an application
the County Court for administration would
revent such an order being obtained (*u*).
We have been hitherto considering the case of Administration
lministration suits by creditors whose claims, suits at instance of
hether against the personal estate or the real beneficiaries.
tate, take precedence of, and are not dependent

(*t*) Armstrong v. Storer, 9 ~~Hare~~ Beav, 277.
(*u*) This assumption is made in Form 20; and there is no jurisdiction so useful as that which enables the personal representative to get relieved from the responsibility by an account, if this can be cheaply taken; it is probable that the framer of the Act considered the power of distributing the assets of the testator after notice given by the executor under the 22 & 23 Vict. c. 31, s. 29, (a section to which see *supra*, p. 60), insufficient.

on the disposition which the deceased may have made of his estate. Before we proceed to the administration suits by legatees or devisees, whose claims depend upon the disposition which the deceased has made of his personal or real estate, we shall consider the case of administration suits, by the persons whom the law appoints to succeed the deceased in his personal or real estate, that is, the next of kin and heir at law.

Intestacy.

Suits by heir, or next of kin.] There is at the first, a striking distinction between these two parties.

In the case of real estate, both the beneficial and the legal interest vest on the death of an intestate in his heir or co-heirs at law. In the case of personal estate, the legal interest vests, on the appointment of an administrator, in the administrator, who has usually a portion but seldom the whole of the beneficial interest.

The duty of the administrator is, first to pay all the debts of the deceased, and the beneficial interest can only be claimed subject to this obligation.

From the first, the administrator was bound to perform this duty, but it was not till the reign of William IV., that the same obligation was imposed upon the heir, and then only in case of the deficiency of the personal estate to pay the debts.

The duty of the administrator being thus to pay the debts before the next of kin can claim anything, and in aid of the liability of the heir, both next of kin and heir are entitled to commence a suit against the administrator, in order to compel him to pay the debts.

Next of kin.

In general, the title of the next of kin will have to be proved in the usual way; if in the proceedings in the Court of Probate for obtaining administration, the sentence decides who were next of kin, this sentence is conclusive in the Court of Administration (*v*).

If the next of kin is a married woman, she and

(*v*) Barr v. Jackson, 1 Ph. 582.

r husband must be co-plaintiffs, and she will be
titled to a settlement out of her share (*w*).

The form of plaint given in No. 4 states, that if letters of administration have been granted, is enough to state that the defendant has possed himself of the personal estate of the deased, but the decretal order would, in such a se, be an order for an account against the deıdant, an injunction against his recovering the ets, and for a receiver and, as we have seen *pra*, p. 55) no administration decretal order could made until a proper administrator is constituted. Title shewn by administration.

The next of kin cannot make the heir a deıdant to his plaint; he has no concern with the al estate, and if the sole next of kin is administor he cannot sue at all in the County Court.

The next of kin must file the plaint against the ministrator.

The form of decree will be as in a creditor's it against the personal estate, with the addition the Form, No. 20. Form of decree.

An inquiry be made and account taken of what r of what share, if any) the plaintiff is entitled as next of kin (or one of the next of kin) of the testate.

The heir is entitled to file a plaint against the ministrator, in order that the personal estate ay be applied in payment of the debts. This is e only means the heir has of securing such plication, and preventing the personal estate ing misapplied, and the real estate being ade to pay out of the proper order of payment. Heir.

The heir must prove a *primâ facie* case, but e same strictness as in contesting the heirship ll not be required. Proof of heirship.

If the deceased has died testate as to personalty, d intestate as to real estate, the heir can only im the payment of debts, in conformity with e proper course of administration.

It follows that if the testator has expressly, or by plication, exempted his general personal estate om the payment of his debts, or if there is no

(*w*) See *infra*.

more personal estate than will pay legacies, the heir cannot file any plaint for administration.

As the County Court jurisdiction is limited, if the personal estate is sworn under 500*l.*, and there are legacies to an amount exceeding the sum under which the assets are sworn, the heir cannot file a plaint.

Form of decree.

The decree, or decretal order, at the instance of the heir, may direct a sale of the real estate, in case of the deficiency of the personal estate (*x*).

The form of decretal order will be exactly similar to that at the suit of a creditor against the real, and therefore the real and personal estate except that the amount will not be of what is due to the plaintiff, and all other the creditors but simply to the creditors of the deceased.

Administration suits by persons claiming under testamentary dispositions.

Suits by legatees generally.] We now pass to the consideration of administration suits at the instance of persons claiming under the testamentary dispositions of the testator.

And first the claimants under testamentary dispositions of the personal estate, they are enumerated by the Act as legatees (whether specific, pecuniary or residuary). The word legacy is a proper word to designate legacies in the shape of annuities, as well as those given in the shape of bequest of a sum payable at once (*y*), and generally speaking annuities are legacies (*z*), and they will probably be considered as included in the word "legacies" in this clause.

Of personal estate.

Legacies. Annuities.

Legacies are usually distinguished into specific and general legacies, not specific and pecuniary legacies.

Definition of specific legacy.

A specific legacy is the bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives A. "my diamond ring," "my black horse," "my £1000 stock," or "£1000 contained in a particular bag," or "owing to me," in these and like instances, the legacies are specific.

(*x*) Price v. Price, 15 Sim. 484.

(*y*) Per L. J. K. Bruce, Heath v. Weston, 3 De G. M. & G. 601; see p. 606.

(*z*) Per Sir J. Romilly, M. R., Ward v. Grey, 21 Beav. 489; see p. 491.

The specific legacy may be of all that the tator possesses of a particular kind, and a quest of all that a testator may possess in the nds would be a specific bequest of all his nded property (*z*).

A legacy is general where it does not amount a bequest of any particular thing or money, stinguished from all others of the same kind, and us, if a testator gives A. a diamond ring, or a rse, or £1000 stock, or £1000, not referring to y particular diamond ring, horse, stock, or oney, as distinguished from others, these legacies ll be general (*a*). Definition of general legacy.

Legacies of a thing described in a general anner, though not money, practically and for purposes are treated as pecuniary legacies, d will be further included in the clause.

The legatees have a right first to have their gacies cleared from the payment of debts by the plication of the property of the testator in its oper order, and next to have their own claims bstantiated against the executor or administrator th the will annexed.

Suit by pecuniary legatees.] The pecuniary legatees ve a right to have the general personal estate plied in payment of the debts.

A pecuniary legatee generally files his plaint ainst the executor on behalf of himself and all ner legatees, unless the executor has admitted sets, and his title is generally proved by the ll itself. Questions of construction, as to a quest, may often arise at the hearing, and these ust be decided to entitle the plaintiff to a decree, for example, the question of whether a legacy vested or not vested. Form of plaint.

Questions of construction.] There is some ficulty in exactly determining whether a estion of construction is to be decided at the aring, or on further consideration.

It depends upon the line of defence taken by Defence to pecuniary legatee's suit.

(*z*) Per Lord Cottenham, Bethune v. Kennedy, 1 M. & C. ; see p. 117.

(*a*) Note to Ashburner v. Maguire, 2 L. C. in Equity, 237.

the executor. The executor is entitled to say, even admitting assets, upon the true construction of the will, the plaintiff is not entitled to the legacy he claims, and the Court must decide this question upon the hearing, to the extent of making the usual decree in a legatee's suit; if assets are not admitted and, if it decides in favour of the plaintiff, or of dismissing the plaint, it decides against the plaintiff.

Plaintiff not entitled.

Construction of bequest.

The parties, however, who are generally most interested in contesting the plaintiff's claim, are those who upon a construction of the bequest different from that contended for by the plaintiff are entitled.

When decided at hearing.

If the question of construction is one which, if decided against the plaintiff, will involve an increase of the residuary estate, as if the defence is that the legacy is lapsed or void, the executor is bound to argue it as he represents the residuary estate.

If the question of construction is merely which of several different parties is entitled to a legacy, which must be paid at all events, the executor is not bound to argue it, as he does not represent absent claimants of a pecuniary or specific legacy, which he admits to be payable at all events.

In the first class of cases, the decision of the Court at the hearing will be final, if it thinks proper to decide the question as it has before its tribunal, the parties who would be before it upon further consideration.

When reserved till further consideration.

In the second class of cases the decision of the Court at the hearing would not be final, as the different claimants to the legacy would come before it and argue the case on further consideration.

The Court, however, will not generally decide the question of construction at the hearing, if there is any doubt as to whether there will be any fund for the payment of the bequest.

Statute of Limitations.

Defence to pecuniary legatee's suit.] The Statute of Limitations, 3 & 4 Wm. 4, c. 27, applies to legacies (*b*), but not to annuities (*c*), special

(*b*) Watson v. Birch, 15 Sim. 523.
(*c*) In Re Astwell's Will, Johns. 112.

ice must be given of this defence, and of set- see *supra*, p. 21.

A debt due from the legatee to the testator y be set off against the claim (*d*), so against a acy to his wife, subject to her equity to a set- ment out of it (*e*). A debt from bankrupt tners was set off against a legacy to the other tner (*f*). A debt barred by the statute may set off (*g*). Set off.

Where a parent gives a legacy to a child, he is derstood to give a portion, and in consequence the leaning against double portions, if the ent afterwards advances a sum on the child's rriage (*h*), or to set him up in business (*i*), the sumption arises that it was intended to be a isfaction of the legacy, either wholly or in t. The rule applies to a stranger testator if has put himself in *loco parentis* (*k*). Parol dence of the object of the advancement is missible against the presumption (*l*). Satisfaction.

There are many constructions on the subject of e rules established by *Chancey's case* and *parte Pye*, and the leaning of the Courts is ainst the rules, and they lay hold of slight cir- mstances to get rid of them (*m*).

Legacies are not payable in the absence of any ecial direction till at the end of a twelvemonth m the testator's death (*n*), and if the plaint uld be filed before that time, the statement that e defendant has not paid must be omitted. If is payable at a later period, the prayer should to secure the legacy. Time for payment not arrived.

The Legislature has declared the power of the urt to decide questions by the 15 & 16 Vict.

(*d*) Chauncey's Case, 1 P. W. 408.
(*e*) Lee v. Egremont, 5 D. & S. 348.
(*f*) Smith v. Smith, 3 Giff. 263.
(*g*) Courtney v. Williams, 3 Hare, 539; affirmed by Lord tenham, 15 L. J. N. S. Chan. 204.
(*h*) *Ex parte* Pye, 18 Ves. 140.
(*i*) Schofield v. Heap, 28 L. J. Chan. 104.
(*k*) Powys v. Mansfield, 3 M. & Cr. 359.
(*l*) Hopwood v. Hopwood, 7 H. L. Cas. 728.
(*m*) Hassell v. Hawkins, 4 Drew. 468.
(*n*) Child v. Elsworth, 2 D. G. M. & G. 681.

c. 81, s. 51, without deciding everything, althoug it has not limited the discretion of the Court.

Questions of fact, as to the title to a legacy may also arise, as in case of misnomer, or o whether the legatee answers the description in th will, is the child of A., &c., &c.; and this will b dealt with upon the same principles as question of construction.

If a married woman is the legatee, her husban must be a co-plaintiff, unless it is given to he separate use, when she must sue by her nex friend (*o*), and her husband, even though a uncertificated bankrupt, must be a party (*p*).

If the legacy is to the widow of the testator i lieu of dower, and he died possessed of real estat of which she would have been dowable, she i entitled to priority to all other legatees, and nee not, it would appear, sue on behalf of herself an them.

If the legacy is to a charitable institution (*q* which is not of a permanent nature, the Attorne General must be made a defendant (*r*).

Invalid legacy.

The legacy may be invalid, as for perpetuit as a gift to keep up Shakepeare's House at Stra ford (*s*) or a tomb (*t*), or against public policy, or t discharge poachers in prison (*u*), or it may be legacy to a charity to invest in land (*v*).

Assuming, however, that the legatee is clearl entitled upon the face of the will, he will get decretal order against the executor.

An annuitant must be considered as a legate and is entitled to the same species of relief.

Ordinary decree.

Decree in pecuniary legatee's suit.] The decre in a plaint by a pecuniary legatee always direc an account of the testator's estate not specificall bequeathed in a creditor suit, the account is the testator's estate generally; this arises out

(*o*) Hope v. Fox, K. & J.
(*p*) May v. Selby, 2 Y. & C.
(*q*) See Acey v. Simpson, 5 Beav. 35.
(*r*) Wellbeloved v. Jones, 1 S. & S. 40—43.
(*s*) Thomson v. Shakspeare, 1 De G. & J. 399.
(*t*) Ricard v. Robson, 31 Beav. 204.
(*u*) Thrupp v. Collett (No. 1) 26 Beav. 125.
(*v*) Denton v. Manners, 25 Beav. 38.

e rule as to the order of administration before verted to.

This distinction has not been attended to in e decretal order, No. 20, but it will be proper observe it.

Decree of persons interested in real estate are made parties.

It follows from the order of administration, at a pecuniary legatee has a right to make, as fendants to his plaint, not only the executor, but the allegation of the insufficiency of the neral personalty, also any devisee of the testor who has real estate expressly devised to him pay debts, the heir of the testator if any estate as descended to him, and also any devisee of al estate which is charged with debts in their der, and assuming the deficiency of the prior nds to pay debts, as all these descriptions of al estate are applicable before pecuniary legacies the payment of debts.

The decretal order in these cases will inquire to the various descriptions of real estate specied above, with the same directions as in the case a creditor seeking the sale of real estate, mited, however, to these special descriptions of tate.

A pecuniary legatee, however, cannot make a ecific devisee a party, as the legatee is bound pay debts before the specific devisee.

The decretal order, after providing for the payent of the debts, directs an account of the gacies of the testator, a legatee having no right a decree for payment of his own claim alone, nless the executor has admitted, or does admit, sets for the payment, when the decree is personal gainst him), but only to payment in common with her legatees (*w*).

Suit by specific legatee.] A specific legatee is ntitled, if the subject bequeathed exists, and if e debts are paid, to a delivery over of the subct bequeathed to him, without reference to any her legatee.

A specific legatee, however, can only claim his

(*w*) Mitford on Pleading, p. 168.

legacy after debts paid, and unless the executor will admit assets *ultra* the specific legacies for the payment of debts, the decretal order will be made at the suit of the specific legatee for administration of the personal estate, and, if necessary, of that portion of the real estate which is liable for the payment of debts before specific legacies.

The title of the specific legatee is often clear upon the face of the will, but questions of fact and of construction may arise at the hearing, which will have to be decided or not, according to the principles we have laid down as applicable to the decision of questions of construction in a pecuniary legatee's suit.

Form of plaint.

In a plaint by a specific legatee, it is not desirable to state, as in the Form No. 4, that the defendant is in possession of the subject specifically bequeathed; it is unusual in the case of a legacy of stock, for example, for an executor to transfer it into his own name, and it is not necessary to allege this, in order to obtain the ordinary relief.

It is desirable, however, to avoid an allegation of ademption by stating that the specific subject was in existence at the testator's death.

Construction of bequest.

In case of a specific legacy, the question often arises, whether the subject-matter bequeathed is effectually described; not only may there be a question as to *descriptio personæ*, but as to *descriptio rei*.

Sometimes where there is no executor, or he renounces, and administration with the will annexed is granted; the Court of Probate has already decided the question of construction. It is extremely to be regretted that the Court of Probate and the Court of Construction should be different Courts, but the Court of Construction will not be governed by the decision of the Court of Probate on the question of construction (*x*).

Defence to specific legatee's

The defence to a specific legatee's suit is generally of the same class as to a pecuniary legatee's suit.

(*x*) Hastings v. Hone, 6 Sim. 67.

The defence to the claim of the specific legatee ay be that the specific legacy is adeemed, that it does not exist at the time of the testator's cease (*y*).

Ademption not applicable to demonstrative legacy.

This defence is not applicable to a demonstra- e legacy; a legacy of a particular sum with a nd pointed out for the payment of the sum; is legacy does not fail by the failure of the nd, but must be made good out of the general tate (*z*).

Set off.

Set-off appears not to be applicable to a spe- ic legatee's claim (*a*).

Decree.

The decree made in the Court of Chancery, at e suit of pecuniary and specific legatees, does t, nor will the decretal order and decree further consideration at the plaint of such gatees in a County Court, completely admi- ster the estate.

If the debts are all paid, the decree at the stance of a specific legatee only provides for e delivery over of his specific legacy, and at e instance of the pecuniary legatee only pro- des for the payment of the legal debts and the gacies out of the property not specifically be- ieathed.

It frequently happens in the Court of Chancery at a suit instituted by a pecuniary or specific gatee results in an administration of the re- luary estate. For the executor is, in general, le to file a bill of his own, and the Court ually extends the decree so as to include an tire administration.

It will, however, be observed that an executor s no right to file a plaint in the County Court, so at he will not be able to obtain a general ad- inistration; and, on the other hand, a decree in e County Court, at the instance of a specific or cuniary legatee, will be no bar to a suit in the ourt of Chancery at the instance of a residuary gatee or an executor.

(*y*) Stanley v. Potter, 2 Cox, 182.
(*z*) Savile v. Blacket, 1 P. W. 777.
(*a*) Harvey v. Palmer, 4 De G. & S. 427.

Plaint.

Suit by residuary legatee.] A suit, however, by a residuary legatee involves complete exoneration of the executor, and takes away from him all necessity for defending the personal estate, *e. g.*, if a question of construction as to a legac arises involving the question whether such legacy has, in the events that have happened, sunk into the residuary personal estate; that question is argued by the residuary legatees and the claimant of the legacy, and the executor is silent.

Parties.

A residuary legatee could not formerly file a bill for the administration of the personal estate without making all other residuary legatees parties; now, however, by the operation of the 42nd section of the Chancery Amendment Act, he can file a bill and obtain a decree against the executor alone; but notice of the decree must be served upon the other residuary legatees. The same rule will apply to plaints in the County Court. See Order VII.

A residuary legatee being entitled to the general personal estate only after all the debts and legacies are paid, and being liable before the real estate to the payment of debts, cannot make the heir-at-law or devisee of the real estate a party to his suit; unless the real estate should be devised to pay debts expressly in exoneration of personal estate, when a residuary legatee has a right to make the devisee of such real estate a defendant, in order that it may be applied before the personal estate.

If the residue is given to several not as joint tenants (*b*) nor to a class (*c*), it lapses on the death in the lifetime of the testator of one of those persons and goes to the next of kin (*d*), but it would not be necessary to make such next of kin, any more than any other person interested in the residue, parties to the plaint in the first instance.

Defence depending upon con-

The construction of a residuary bequest is in general not decided by the Court until after th

(*b*) Webster v. Webster, 2 P. W. 347.
(*c*) Shuttleworth v. Greaves, 4 M. & C. 38.
(*d*) Bagwell v. Dry, 1 P. W. 780.

counts have been taken and debts and legacies d; but if it is involved in the title of the intiff, and the defendant insist that the plaintiff s no title, the Court cannot avoid the decision the hearing. struction of bequest.

The decretal order at the suit of a residuary atee will be an account of the personal estate t specifically bequeathed, and not of the personal ate generally, or in a suit at the instance of a editor. Decree.

The appointment of a receiver is by no means course, and cannot be obtained against the ecutor's consent unless misconduct, waste, or improper disposition of the assets on his part be wn (*e*). The practitioner must not be misled the insertion of paragraph 8 in Decretal der XX. A receiver will only be appointed on strong special grounds (*e*). Receiver.

TESTAMENTARY DISPOSITIONS OF REAL ESTATE.

Suit to recover legacy charged on land.] A atee or annuitant who has a charge on real ate is, in the absence of express exoneration, in first place to be paid out of the general personal estate.

Such legatee, therefore, will file his plaint ainst both the executor and the devisee of the d charged with the legacy, and will take a ree first for the payment of the legacy out of personal estate, which must for that purpose administered as before mentioned, and then of the charged estate. Every person interested the charged estate must be served with notice the decree. Executor a defendant.

Suit by devisee.] Every devisee has a right to ecree for administering the personal estate and the real estate since the 3 & 4 Wm. 4, c. 104, king all debts payable out of real estate. Devisee.

Such devisee need not make the heir-at-law

(*e*) Middleton v. Dadswell, 13 Ves. 268.

party to his suit unless he wishes to have the will established against the heir, nor need he now make co-devisees or parties interested in the devise parties to the original plaint (*f*), although they must be served with notice of the decree; the plaint may be against the executor only in the first instance.

If the devise is of land in trust to sell to pay debts, or debts and legacies in exoneration of the personal estate, the devisee has a right to file a plaint against the executor in order to have his trust carried into effect.

If the devise is of land to pay debts simply, and therefore not in exoneration of the personal estate, the decretal order directs inquiries and accounts, and the administration of the personal estate as at the instance of any interested in it.

So if the devise is of land charged with debts care must be taken to keep in mind the rule of contribution of the deceased person's property in payment of his debts, by which the proper parties may be ascertained (*f*).

Parties. A devisee of land to pay debts must file his bill against executor only, as being the only person bound to indemnify such devisee.

A devisee of land charged with debts may make not only the executor but the heir of any land descended party to his suit, and the devisee of land to pay debts, as they are both bound to indemnify the plaintiff.

A specific devisee of land has a right to make the executor the devisee to pay debts, the heir and the devisee charged with debts parties to his suit, as they are all bound to indemnify him.

The plaint, however, will be framed so as to keep in view the order in which the various classes of personalty represented by the executor are liable and not ask any account of that which is liable only after the plaintiff's interest.

Defence. Questions of construction as to devises of real estate will be dealt with by the Court at the hearing if they involve the plaintiff's right to

(*f*) See *supra*, p. 53.

cree; but so far as administration of the estate concerned, by which must be understood the plication of it to pay the charges upon it in the ler prescribed by the law, it is not until after ministration that these questions will be of portance.

Questions of construction respecting devises of l estate will more often arise in suits for the ecution of trusts, which is another and separate nch of this treatise.

Parties.

Suit by creditors claiming in consequence of execu- n of power.] The last persons claiming under the tamentary disposition of a deceased are creditors o claim real or personal estate, on the ground its having been appointed by the testator, and o are entitled to lay hold of the appointed perty to pay debts in priority to the appointees; vided they have exhausted the rest of the per- al and real property of the testator; it would necessary, in such a suit, for the creditor to ke parties not only the executor and devisees real estate, but also the appointees.

A judgment creditor is entitled to take in ecution property over which his debtor has a neral power of appointment (*g*); but no other editor can attach such a fund, unless the debtor s exercised his power by appointing it (*h*). If, wever, he has intended to execute it, and some m has been omitted in the execution, equity ll supply this formality at the instance of a editor (*i*).

Defence.

The defence to a suit, besides the other de- nces to a creditor's suit, may be that the ap- intee has assigned for valuable consideration (*ii*).

General observations as to defences.] Before nsidering the steps to be taken under decree, ne general observations may be made appli- ble to all classes of administration suits. An mission by the defendant of the truth of the

(*g*) 1 & 2 Vict. c. 110, s. 13.
(*h*) Jenney v. Andrews, 6 Mad. 264.
(*i*) Holmes v. Coghill, 12 Ves. 206.
(*ii*) George v. Milbanke, 9 Ves. 190.

allegations in the plaint will not in the case of a creditor's suit stating no admission of assets, or other personal liability to pay, involve payment of the demand, and does not put an end to the suit.

In this respect, Rule 2 of Order II. seems inapplicable, as the subsequent costs after the decree are most important and yet are unprovided for.

The defendant may admit the truth of the plaint, and if such plaint merely state the title of the plaintiff as a creditor, or legatee, or heir or devisee, the defendant will generally be right, if he does not dispute that title, to do so, as the decretal order follows it of course.

The Form 19 has inserted a disclaimer as heir at law or next of kin, or as one of the next of kin; but an heir at law cannot disclaim that position, and he will get nothing as to costs by doing so, as he is entitled to have his costs out of the produce of the real estate if he was properly made a party, and from the plaintiff if he was improperly made a party.

The orders have made no provision for amendment of plaint by the plaintiff, though, if the devisee disclaim, a new plaint ought to be filed against the heir, unless the Judge will amend at the hearing.

A next of kin also will never be made a defendant to an administration suit, unless he has incurred some liability, as by interfering with the assets; a man cannot disclaim his liability (*l*).

Special defences.

The special defences of infancy, coverture, discharge as bankrupt or insolvent, can only have application in administration suits to that portion of the decretal order which directs accounts with a view to a personal claim against the defendant (*m*).

Infancy, coverture, bankruptcy, &c.

An infant cannot be a defendant, as an executor or administrator; if he is a defendant as an heir or devisee, his infancy does not prevent a decree

(*l*) Per Lord Eldon, Glassington v. Thwaites, 2 Russ. 458; p. 462.

(*m*) As to special defences, see *supra*, p. 21.

ng made; a married woman's coverture is, in
e manner, no obstacle to a decree when her
band is made a party, and the discharge under
ıkrupt or insolvent Acts is no defence to a suit
ainst the executor, administrator, devisee in
st, or heir if only a trustee, whose estate as
stee does not pass to the assignees, though the
ignees may be a necessary party in respect of
interest they acquire by bankruptcy or insol-
ıcy in the beneficial interest of an heir or
visee.

Set-off. The set-off which may be pleaded can only be
et-off on the part of the estate of the deceased
rson, and not a set-off on the part of the de-
ıdant personally.

If the claim is against the real estate, although
e set-off could be strictly pleadable only by the
ecutor or administrator, as the debt must be
e to such executor or administrator as part of
e assets of the deceased, yet the defendant, re-
esenting the real estate, will be, of course,
itled to plead it if the executor or adminis-
tor should omit to do so.

A set-off of a debt due from the legatee may
equally pleaded when the legacy is charged on
ıd as when it is a simple legacy, because the
acy charged on land is payable, in the first
ce, out of the personalty of which the debt
ms a part.

Statute of Limitations. A trust to pay debts out of personal estate will
t prevent the operation of the Statute of James,
., after six years (*n*). But a trust to pay debts out
or a charge of debts upon real estate will do so
ough the personalty is sufficient to pay debts (*o*).
By the operation of the Statute of Wm. 4,
e., after twenty years, where a trust to pay
ots is created, no debt, not actually barred at
e testator's death, is subsequently barred (*p*).

(*n*) Evans v. Tweedy, 1 Beav. 55.
(*o*) Crallan v. Oulton, 3 Beav. 1.
(*p*) Hughes v. Wynne, T. & R. 307; Bentley v. Robinson,
r. Ch. Rep. 287.

Where there is a mere charge, such debts are barred by 3 & 4 Wm. 4, c. 27, s. 40 (*q*).

The Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 42, should be also pleaded to prevent a specialty creditor, going against the land, from recovering more than six years' interest (*r*).

A legatee may be met by a plea of the Statute of Limitations, 3 & 4 Wm. 4, c. 27; twenty years is the time, and six years' interest can only be recovered, unless there is a severance of legacy from assets, when it becomes a trust fund and time is no bar (*s*).

A legacy charged on land is, of course, not barred by the statute as long as there are prior charges existing which exhaust the fund (*t*).

The 3 & 4 Wm. 4, c. 27, s. 40, has been held a bar as to assets possessed by executor more than twenty years before bill filed (*t t*). This would not be the case of a trustee, who is always liable for the trust estate (*u*).

It must not be forgotten that all special defences which the defendant wishes to make must be made at the hearing, and cannot be set up in the ultimate proceedings, although the decretal order only directs accounts and inquiries; if the account goes generally against the defendant, he will not be able afterwards to insist on the Statute of Limitations or bankruptcy as a bar to any portion of the sum he has to account for, unless he has a direction to that effect inserted in the decretal order.

Questions as to value of estates to be administered.] It will be seen from the above view of the mode in which the estates of testators are administered by the Court in what cases the County Courts have jurisdiction; it will of course

(*q*) Dundas v. Blake, 11 Ir. Ch. Rep. 138.
(*r*) Faulkner v. Daniel, 3 Hare, 212.
(*s*) Philippo v. Munnings, 2 M. & C. 314.
(*t*) Ravenscroft v. Frisby, 1 Coll. 16.
(*t t*) Adams v. Barry, 1 Coll. 290.
(*u*) Obee v. Bishop, 1 D. G. F. & J. 137.

ot have jurisdiction when the estate on probate r administration is sworn under any higher sum ıan 500*l.*

If a creditor or legatee chooses to sue for the dministration of the personal estate alone, with-ut proceeding to administer the real estate, and ıe personal estate is under 500*l.*, a decretal order ill be made, and, after such administration has aken place, an unsatisfied creditor or legatee ıay proceed in the County Court for administra-ion of the real estate if that is not more in value han 500*l.*

Of course many questions will arise as to the ıode of valuing the property; at the same time ery few have arisen as to the scale of costs, hich is in the Court of Chancery different in ases involving 1000*l.* and larger sums; for ex-mple, if there is a mortgage affecting a real state so that the equity of redemption only is not orth more than 500*l.*, a creditor of the mortgagor ight perhaps insist that the only estate which e sought to administer was the equity subject to he mortgage, and claim administration in the County Courts.

Proceedings under decree.] The plaintiff will, f he obtains a decretal order, bespeak the order nd leave with the registrar the brief for counsel if any), and a copy of the plaint, and the documents nd written evidence upon which the order was btained, and any admissions.

The registrar will then draw up the order ıpon the entry of the appearance of the parties hho appeared, and affidavits of service upon those hho did not appear.

As soon as the order is sealed and filed, it will be the duty of the registrar to determine who are he parties to be served under the 42nd section of he Chancery Amendment Act. Serving parties with notice of decree. Order vii.

The rules hereinbefore laid down will often letermine this question, but it is not unfrequently he practice of equity draftsmen to name in the ill the parties, so far as known to the plaintiff, who would have been necessary parties to the uit before the Chancery Amendment Act, and,

at all events, the plaintiff will give every assistance to the registrar in performing this very responsible duty; in case of parties who are infants or persons of unsound mind not so found by inquisition, the plaintiff must make an affidavit in order to enable the registrar to serve them, according to the Order VII., 5, 6, 7, and Regulations 7 and 8, of August 8, 1857.

The party served may attend the proceedings, but it is obvious that the validity of the jurisdiction conferred upon the County Courts will be much impaired if the rules of the Court of Chancery as to costs of such attendance are to be allowed.

Cost of parties served.

It is of the highest importance that the Judges should exercise the power they undoubtedly have of enacting that the costs of only one person attending the proceedings on behalf of a class should be allowed; this, with the power of giving the conduct of proceedings to any person they think fit, which is given by rule 17 of Order XXIII., will limit the expense of the suit.

Accounts and inquiries.

The next step is for the registrar to proceed with the accounts and inquiries.

The accounts of the accounting party must be taken by his making out the account and verifying the same by affidavit, in the manner prescribed by 33rd rule of Consolidated Order XXXV. The proceedings upon the account being brought in will be as indicated in that order.

Interest on legacies. Order xxiii, rule 23.

Interest on legacies is to be computed at 4 per cent. from the end of the year after the testator's death, unless otherwise ordered, or a different rate is directed by the will.

This is of course inapplicable to specific legacies which carry, if of stock, the dividends from the testator's death (*a*).

If any other period of payment is named, from that period interest will be ordered (*b*).

(*a*) Clive v. Clive, Kay, 600.

(*b*) Lord Londesborough v. Somerville, 19 Beav. 295. Interest in general is reckoned from the end of a year, because legacies when no time of payment is fixed are not payable until the end of a year from the testator's death, that time being supposed by the Courts to be sufficient to enable the executors to wind up the estate.

If the legacy is a satisfaction for a debt, it will carry interest from the death of the testator when the debt was due (*c*), so when legacy is charged on real estate, interest is due from the death (*d*).

If the legacy is given by one who is a parent (*e*), or who has put himself *in loco parentis* (*f*), interest is payable from the death as for maintenance, and this extends even when the legacy is made payable at some later period than the year after the death (*g*), and be then payable contingent on the child living, or on any other event.

A residuary legatee, if only for life, is entitled to interest from the death (*h*).

Annuitants cannot get interest on the arrears of annuities (*i*).

Advertisements.

The advertisements for creditors will be prepared not by the plaintiff, as in the Court of Chancery, but by the registrars. Order XX., Rule 5.

The mode of sending in the claims is specially provided for by Rules 5, 6, 7 and 8 of Order VI.

It is to be remembered that the plaintiff if a creditor must prove his debt again in the registrar's office, although he has proved it at the hearing.

The registrar, by rule 9, is at liberty, upon the evidence of the executor or accounting party (*ii*) to allow the debts; it is, however, the right of the plaintiff to attend the proceedings, and to check the claims, and to offer any objection he thinks proper. It is competent for any person interested in the estate to set up the Statute of Limitations, though the executor or administrator should not

(*c*) Clark v. Sewell, 3 Atk. 99.
(*d*) Spurway v. Glynn, 9 Ves. 483.
(*e*) Beckford v. Tobin, 1 Ves. 316.
(*f*) Wilson v. Maddison, 2 Y. & C. C. C. 372.
(*g*) Hill v. Hill, 3 V. & B. 183; Brown v. Temperley, 3 Russ. 213.
(*h*) Dimes v. Scott, 4 Russ. 195.
(*i*) Booth v. Coulton, 30 L. J. N. S. Ch. 378.
(*ii*) This must if the suit affects the real estate include the devisee or heir, as an admission of a debt by the executor does not bind the devisee; Putnam v. Bates, 3 Russ. 188.

do so, against any creditor (*k*) but the plaintiff, whose suit they shall not come in under to defeat him (*k k*), but it is doubtful whether the registrar can do so.

Interest for debts is provided for by the Rule 22, Order XXIII.

Registrar's certificate.] The registrar will prepare his certificate of the result of the accounts and inquiries directed by the decretal order, according to Order VIII.

Separate certificate for payment into Court.

If the registrar wishes, or any party wishes, that a separate certificate should be made on any special matter, as, for example, of the result of an account, so that the accounting party may, on a balance found due from him, pay it into Court, this separate certificate will be given.

The form of decretal order No. 20, indeed, directs that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or the hands of any person by his order or for his use.

It is not according to the course of the Court to make such an order, except in some rare cases; in cases where the defendant is the executor or administrator, against whom an account is directed, he can only be ordered to pay in what he admits to be in his hands, or what shall be found due from him on the balance of the account, in taking which account all just allowances are to be made.

The decretal order might direct that the defendant should pay into Court what should be found due from him on the balance of account within a certain time after the registrar has signed the allowance of the account.

But as the provisions of Order XVI. for enforcing orders are extremely ample, it would be better to insert in the decretal order an order that the balance certified to be found due from

(*k*) Shewen v. Vanderhorst, 2 R. & M. 75.
(*k k*) Fuller v. Redman, 26 Beav. 634

the defendant should be paid in by him in the same manner as is specified in the common order of the Court of Chancery appointing a receiver; but such decretal order cannot be enforced without a substantive order (*l*), although non-compliance with it might be a ground for refusing the defendant his costs.

The orders assume that the certificate of the registrar will be made before the day appointed for the hearing of the cause on further consideration; it will be necessary to remember, that unless the certificate is made, the cause cannot be heard. The practice of the Court of Chancery of not hearing the cause on further consideration, until a general certificate has been made, that is, a certificate as to all the matters referred to the registrar by the decree, is much to be deprecated, as it affords frequent cause for delay, and in some cases such delay is without reason; for example, on an administration decree at the suit of a party interested in the property, when the creditors' claims have been adjusted, and when a fund has been realized for paying their demands, or a portion of their demands, but where in consequence of the inquiries as to the parties beneficially interested, subject to the creditors' claims, having not been answered, the general certificate cannot be obtained, it is obvious that the certificate as to the creditors ought to be made, and the cause heard, as to the distribution of that fund.

Legal and equitable assets.

Further consideration.] On the hearing of an administration suit on further consideration, questions will arise of importance; the principal are—1. The order in which the creditors are to be paid. 2. The marshalling of the fund out of which creditors, or the parties interested, are to be paid. 3. The costs of the suit.

We have already stated the order in which the property of deceased persons is applicable to the payment of debts.

Order of

Courts of Equity have always treated the dis-

(*l*) Davies v. Cracroft, Seton, 3rd edit. p. 1020.

payment of debts.

tinctions of the law as to the priority of debts *inter se* as an injustice, and the rule has been that assets, which can only be reached by the creditors through the intervention of a Court of Equity, are to be distributed among all creditors equally, without regard to the rule of the common law.

Legal personal assets.

The distinction has thus arisen between legal and equitable assets. Legal assets are either personal or real assets. The order in which debts (*m*) are paid out of legal personal assets, that is, the personal estate which can be recovered by an administrator merely by virtue of his office, whether at law or in equity, and the value of which, therefore, creditors can recover from him at law (*n*), is as follows:—

1. Debts due to the Crown on record or specialty.
2. Debts privileged by statute.
3. Debts of record, that is, judgments of a Court of record (*o*), and decrees in equity according to dates, if registered.
4. Recognizances and statutes.
5. Debts by specialty, as rent, or upon an instrument under seal, as a bond or covenant for valuable consideration.
6. Simple contract debts, as on bills or notes, or a verbal promise.
7. Voluntary bonds (*p*), but in the administration of assets a voluntary bond was held to be preferred to interest on debts having interest only by virtue of the Chancery Orders of 1841, and, of course, to the interest payable under rule 22, Order XXIII.

Legal real assets.

The order of payment of debts out of legal real

(*m*) Silk v. Prime, 2 L. C. in Equity, 82, see p. 92.

(*n*) Cook v. Gregson, 3 Drewry, 547; Christy v. Courtenay, 26 Beav. 140; Mutlow v. Mutlow, 4 D. G. & J. 526.

(*o*) 23 & 24 Vict. c. 38, s. 3; *Re* Turner, 33 L. J. N. S. Ch. 232.

(*p*) If a note or bond is given in consideration of the cancelling a voluntary note or bond, it becomes itself for valuable consideration; Dawson v. Keaton, 3 Smale & Giff. 186.

ssets, that is, descended freehold estates, whether he interest of the deceased be legal or equitable (*q*), and freehold estates devised by a will, not providing for the payment thereout of the testator's debts (*r*), is as follows:—

1. Debts due to the Crown by record or specialty registered. These constitute a lien on the land by statute (*s*).
2. Judgments in Courts of record and decrees in equity may constitute a lien on the land, by the power of the creditor to issue an elegit (*t*).
3. Statutes and recogizances. They constitute a lien by statute (*u*).
4. Specialty debts in which the heirs are bound.

Legal real assets are not liable to any other debts.

Equitable assets are either personal or real.

Equitable personal assets. Equitable personal assets are personal property which the executor or administrator cannot recover simply by virtue of his office, or which the creditors can only reach by applying to a Court of Equity, such as:—

Personal estate over which a person has a power of appointment which he has actually exercised.

Or the separate property of a married woman, which she has charged with the payment of debts (*v*).

A testator generally cannot vary the priority of debts over his personal estate, or prevent it from being treated as legal assets (*w*).

Equitable real assets. Equitable real assets are—

(*q*) 29 Car. 2, cap. 3, s. 10.

(*r*) 3 & 4 Wm. and Mary, c. 14.

(*s*) 33 Hen. 8, c. 39, s. 50, this section is not repealed by 26 & 27 Vict. c. 125.

(*t*) The law as to future judgments is unsettled by 27 & 28 Vict. c. 112. See Thornton v. Finch, 4 Giff. 505, and *infra*, Chapter on Mortgages.

(*u*) 27 Ed. 3, st. 12; 23 Hen. 8, c. 6. These statutes, although mentioned in 26 & 27 Vict. c. 125, cannot be considered as abolished, see 27 & 28 Vict. c. 112.

(*v*) Owens v. Dickinson, Cr. & Ph. 48.

(*w*) See Lord Eldon's observations in Clarke v. Lord Ormond, Jacob, 108, see p. 115.

1. Real estate charged by the testator, or devises for payment of his debts.

   The statutes of Fraudulent Devises, and Sir John Romilly's Act (*x*) do not apply to cases where there is a devise of land for the payment of the testator's debts, which the Courts have held to mean all debts (*y*).
2. Real estate, which the creditors cannot get at without the assistance of a Court of Equity.
3. Real estate, under Sir John Romilly's Act, is expressly made equitable assets, with a provision that specialty debts, where the heirs are bound, are to have preference over simple contract debts and specialties where the heirs are not bound (*z*).

The creditors, however, who have a lien on the land, as judgment creditors, could disregard the devise, and enforce their priority by issuing an *elegit*, and consequently judgment creditors were not deprived of their priority by a devise for payment of debts (*a*). In the administration of either personal or real assets, the Court cannot neglect the priority of that creditor who has a lien on the land; the lien of judgment creditors is extended by their power to take estates over which the testator had a disposing power (*b*); if a judgment creditor issued an *elegit*, he had priority over him who had not done so (*c*).

Marshalling.] From the order of payment of debts *inter se*, enabling the creditors to disturb the order of payment prescribed by the Court, arises the practice of the Court of marshalling the assets.

The principle of marshalling is, that a person having two funds to satisfy his demands, shall not by his election disappoint another who has only

(*x*) Ball v. Harris, 4 M. & C. 268.
(*y*) Vernon v. Vawdrey, Barnard Ch. R. 280.
(*z*) Cummins v. Cummins, 3 Jones & Lat. 64; Richardson v. Jenkins, 1 Drewry, 177.
(*a*) Sharpe v. Earl of Scarborough, 4 Ves. 538.
(*b*) 1 & 2 Vict. c. 110, s. 11.
(*c*) Rowe v. Bant, 1 Dick. 152.

one fund (*d*). If the claimant with the double fund has priority over the fund liable to both claims, the claimant with the single fund shall stand in the place of the other claimant over the second fund to the extent to which he has appropriated the single fund, provided he does not thereby disturb the order of administration of the Court.

Between creditors.

A creditor by specialty, in which the heirs are bound, can exhaust the personal estate in priority to simple contract creditors; such simple contract creditors were therefore, before 3 & 4 Wm. 4, c. 104, entitled to stand in the place of such specialty creditors as against the descended estate, against the heir, who again could, or can now, if his estate is exhausted by any creditors, go against land expressly devised to pay debts, but not against land simply charged with the payment of debts (*e*).

Between creditors and legatees.

Creditors, when there is land devised to pay debts, may exhaust the personal estate, but legatees who are not liable to pay debts until after land devised for that purpose, can stand in the place of the creditors against the land (*f*), but only to the amount of the personalty (*g*).

Legatees, however, cannot, if creditors exhaust the personal estate, stand in their place against real estate devised, whether such devise be specific or residuary (*h*). Specific legatees can, however, do so to the extent of a contribution *pro ratâ*.

Now that mortgaged estates are to bear their own burden, the residuary legatees or next of kin will be entitled to rank against the mortgaged estate, if the mortgagees appropriate their fund; all classes of creditors were entitled to do so before the Act 17 & 18 Vict., c. 113, because an equity of redemption descendible to the heir was equi-

(*d*) Aldrich v. Cooper, 8 Ves. 382.
(*e*) Tombs v. Roch, 2 Coll. 499.
(*f*) Paterson v. Scott, 1 D. G. M. & G. 53.
(*g*) Cradock v. Piper, 15 Sim. 301; Richard v. Barrett, 3 K. & J. 289.
(*h*) Mirehouse v. Scaife, 2 M. & C. 695.

table assets (*i*). It is said all classes of legatees were entitled to do so (Seton, 136), but this is not in accordance with principle in the case of pecuniary legatees, if the equity of redemption was devised.

Assets not marshalled for charitable legacies.

The rule of marshalling, however, does not apply to charitable legacies (*k*). The Act of Geo. 2, commonly called the Mortmain Act, prohibits land, or interests in land, being devised to charitable purposes; a legacy payable out of land, or personalty which is an interest in land, as mortgages, is void. If a creditor exhausts the personalty, a charitable legatee cannot stand in the place of that creditor against land charged with debts, as that would be indirectly to violate the Mortmain Act, but he might stand in the place of that creditor against personalty charged with debts, if it were not for another rule, that charities are not favoured by the Court, and therefore, in the absence of express directions to that effect in the will (*l*), no marshalling will be allowed in favour of a charitable legacy. If it is payable partly out of pure personalty and partly out of personalty savouring of the realty, it fails *pro ratâ*, and is not allowed to be paid entirely out of the pure personalty, for that would be to disappoint the parties entitled to the pure personalty charged with the legacies.

Retainer by executor, or administrator, or trustee.

Retainer.] Besides the order of payment which we have mentioned, there is an order arising from the right of retainer possessed by an executor, or administrator, or an heir or devisee. This is said to be founded on the impossibility of those parties suing themselves, but it is limited to a power of selection, and is merely a presumed exercise of that right, as an executor cannot retain his own debt against a creditor of a higher degree; the right of retainer, however, is not affected by the party entitled to it paying money

(*i*) Lomas v. Wright, 2 M. & K. 769.

(*k*) Mogg v. Hodges, 2 Ves. 52; Johnson v. Woods, 2 Beav. 409.

(*l*) Robinson v. Geldard, 3 M. & G. 735; Nickisson v. Cockill, 1 N. R. 385; Reversed on appeal, 2 N. R. 547.

nto Court (*m*), and it has priority over the costs of suit (*n*). Executors are allowed to stand in place of creditors whom they have paid, though the payments are disallowed against a higher degree of creditors (*o*).

An assignee for value of a legatee may, as well as the legatee himself, file a plaint, but the executor can set off against the claim any payments made to the legatee (*p*); the assignee of an equity takes it subject to all the equities that affect it, and therefore if an executor have a beneficial interest, that interest is liable even in the hands of an assignee for value to make good the assignor's breach of trust, though committed after the assignment (*q*).

Abatement.] If the assets are insufficient for the payment of the general legacies in full, they must abate.

Specific legacies, as has been shewn, are not applicable to payment of debts until after the general legacies are exhausted; a demonstrative legacy has, in this respect, the same as a specific legacy, or the same privilege (*r*).

A legacy does not abate if given to a widow in lieu of dower (*s*), or given in consideration of relinquishment of a debt actually due (*t*), or if the testator has distinctly stated his preference of one legacy over another (*u*), but the general rule is that legacies are to be paid equally.

Costs.] The general personalty is liable for all costs of an administration suit, or for a suit relating to any question necessarily arising under

(*m*) Executor—Tipping v. Power, 1 Hare, 411; Devisee of Real Estate—Hall v. Macdonald, 14 Sim. 1.
(*n*) Chissum v. Dewes, 5 Russ. 29.
(*o*) Mitchelson v. Piper, 8 Sim. 64; unless reported beneficial to the estate, Spackman v. Holbrook, 2 Giff. 198.
(*p*) Dibbs v. Goren, 11 Beav. 483.
(*q*) Stronge v. Hawke, 4 D. G. & J. 632.
(*r*) Roberts v. Pocock, 4 Ves. 160.
(*s*) Stahlschmidt v. Lett, 1 Sm. & G. 421.
(*t*) Davies v. Bush, 1 Younge, 341.
(*u*) Brown v. Brown, 1 Keen, 275.

a testator's will, although relating to pecuniary or specific legacies (*v*).

If the claimant fails, he has generally to pay the costs of suit, unless the question of construction of the will is decided, when, if it was a case of real doubt, the costs are paid out of the general personalty (*w*).

A claimant obtaining an administration decree, who is informed beforehand that there are no assets to meet his claim, has to pay the costs of the suit, he being regarded as in fact, failing in his claim, though he obtain a decree (*x*).

In general, however, the plaintiff gets his costs of suit out of the funds if there are assets, as between party and party, but the defendant who is the executor, or administrator, or devisee in trust or heir (*y*), as between solicitor and client (*z*).

If the assets are deficient, the plaintiff, whatever be his character, is allowed costs as between solicitor and client (*a*).

If the plaintiff have realised any fund by his exertions, though he by reason of superior claims gets no portion of it, he is allowed his costs out of it, as between party and party (*b*).

But the executor or administrator is entitled to his costs in priority to the plaintiff's costs (*c*).

If part of the residue fails, as by its being given to charity and not consisting of personalty, the costs are only borne by such part *pro rata* with the rest of the residue; the next of kin are no more liable to pay the costs than the residuary legatees (*d*).

The personal estate pays the costs of a question

(*v*) Ripley v. Moysey, 1 Keen, 578.
(*w*) Cooper v. Pitcher, 4 Hare, 485.
(*x*) King v. Bryant, 4 Beav. 460.
(*y*) Tardrew v. Howell, 30 L. J. N. S. Ch. 191.
(*z*) Tipping v. Power, 1 Hare, 411.
(*a*) Cross v. Kennington, 11 Beav. 89; Thomas v. Jones, 29 L. J. N. S. Ch. 570.
(*b*) Tanner v. Dancey, 9 Beav. 339.
(*c*) Wedgwood v. Adams, 8 Beav. 103.
(*d*) Christian v. Foster, 2 Phillips, 161.

of construction raised by the will as to real estate (*e*).

Costs are given to creditors who prove by Order XXIII., r. 22, but if the estate is deficient these costs will be added to the debt and not paid (*f*).

If the testator has created a fund for the payment of debts and legacies, exonerating the personal estate, the costs of administering this fund are paid out of the fund itself, not out of the personal estate (*g*).

Injunction against suit, or action after decree.

The moment a decree is obtained, under which creditors can come in (*h*), the executor or the plaintiff can obtain an injunction to prevent any creditor suing the executor at law, or proceeding upon a judgment (*i*), unless the sheriff has levied (*k*). If the creditor is suing in equity, the suit will be stopped, unless it seeks for further relief than has been obtained by the first decree.

The costs of the creditor or legatee suing in the second suit will be paid him, if there are assets, down to the time of his having notice of the decree, after which he ought not to proceed (*l*).

Although the suits in different Courts will be transferred to the one in which the first suit was commenced, under Order VIII., r. 20, yet there is nothing to prevent a decree in a friendly suit being obtained by consent before a decree in a hostile suit (*m*).

(*e*) Pickford v. Brown, 2 K. & J. 426.
(*f*) Flintoff v. Haynes, 4 Hare, 309.
(*g*) See Att. Gen. v. Southgate, 12 Sim. 77, L. C.
(*h*) Ranken v. Harwood, on appeal, 15 L. J. Ch. 498.
(*i*) Drewry v. Thacker, 3 Sw. 529.
(*k*) Marriage v. Skeggs, 4 D. G. & Jones, 618.
(*l*) Jackson v. Leaf, 1 J. & W. 231; Canham v. Neale, 26 Beav. 266.
(*m*) Furze v. Hennett, 2 D. G. & J. 125.

CHAPTER II.

EXECUTION OF TRUSTS.

Jurisdiction 98
Requisites of a Trust . . 99
Trust, what 99
What may be the subject of a Trust 99
Settlor 100
Mode of creating Trust . 100
Trusts of Real Estate . . 100
Who may be a Trustee . . 101
——— ——— Cestui que Trust 101
Precatory Trusts . . . 102
Voluntary Settlements . . 103
Creditors' Deeds . . . 104
Resulting Trusts . . . 107
Purchase in name of Stranger 108
——— ——— *Child, &c.* 108
Joint Purchases . . . 109
Constructive Trusts . . . 109
Renewable Leaseholds, &c. . 111
Factors, Agents, &c. . . 111
Acceptance and Disclaimer by Trustee 112
Quasi-*Trustee* . . . 113

Suits to execute Trusts . . 113
Parties generally . . . 113
Suit by Trustee . . . 114
Suit by Cestui que Trust . 115
Suit to repair breach of trust, or fix Defendant with constructive Trust . . . 117
Duties of Trustees . . 117
Investment of the Trust Property . . . 120
Control of the Trust Property 121
Parties 121
Plaint 122
Defences 123
Lapse of Time . . 123
Release 125
Waiver and Acquiescence 125
Bankruptcy . . . 126
Bonâ fide *Purchase without Notice of Trust* . 126
Effect of instituting Suit as to Trust Estate . . . 126
Payment into Court . . . 127
Receiver 127
Injunction 127
Evidence at hearing . . . 128
Decree at hearing . . . 128
Interest—Rests . . . 130
Allowances to Trustees . . 131
Further Consideration . . 133
Costs 133

Jurisdiction.] The 28 & 29 Vict. c. 99, s. 1, enacts that the County Courts shall have all the power and authority of the High Court of Chancery in all suits for the execution of trusts, in which the trust estate or fund shall not exceed in amount or value the sum of £500. In such suits the judge has all the powers and authorities for the purposes of the Act of a judge of the Court of Chancery (s. 2.)

Forum.

There is no special provision in s. 10 as to the Court in which such suits are to be commenced, and they must therefore, under clause 6, be insti-

tuted in a County Court district in which one at least of the defendants resides or carries on business.

The mode of proceeding is by plaint (Order I., rule 1).

REQUISITES OF A TRUST.

Trusts are, either declared resulting or constructive.

Trust what.] Under the term trusts are included declared trusts (*a*), that is, those actually declared,—generally and necessarily, if of real estate, by writing, but if of personal property, sometimes by parol (*b*),—and resulting or constructive trusts, that is, trusts arising, in the view of Courts of Equity, from certain circumstances. Our observations are here generally confined to declared trusts.

Requisites of a declared trust.

In order to the creation of such a trust, there must be (1) a subject-matter of the trust; (2) proper parties to constitute it. These parties are— 1. A settlor or author of the trust. 2. A trustee or person in whom the trust estate in the subject-matter is or is intended to be vested. 3. A beneficiary or object of the trust, technically called the *cestui que trust.*

What may be the subject of a trust.] All property and every valuable right, whether alienable at law or not, may be made the subject of a trust, unless the alienation is prohibited by the policy of the law. Thus land, *choses in action*, and even mere possibilities, may be made subject to trusts; but trusts cannot affect inalienable property, such as pensions and pay, estates which have been settled for public services, &c. And a trust can be enforced as regards moveables or land abroad, if the trustee is within the jurisdiction of the Court (*c*).

Property abroad.

(*a*) Hinton v. Hinton, 2 Ves. 631; see p. 634, per Lord Hardwicke.

(*b*) Macfadden v. Jenkyns, 1 Phil. 153; Jones v. Lock, 11 Jur. N. S. 913; 1 Law R. Ch. Ap. 25.

(*c*) Roberdean v. Rous, 1 Atk. 543.

Settlor.] As to the settlor, every person capable of dealing with property by way of absolute alienation may also deal with it by way of trust. In general this is effected by his aliening the property to some other upon a trust explicitly declared or referred to at the time of the alienation; but it is competent for any one, by an appropriate declaration, to convert himself into a trustee, and no consideration is necessary to a declaration of trust (*d*).

No consideration necessary to support a trust.

Mode of creating trust.] Independently of statute, a trust may be created, either of real or personal property, by parol declaration, at all events, wherever the property passes otherwise than by deed. And this is still the law, at all events, as to personal property (*e*).

Trust of personalty may be by parol.

Trusts of real estate.] The Statute of Frauds, 29 Car. 2, c. 3, enacts (s. 7) that "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else shall be void."

By Statute of Frauds, sect. 7, must be in writing.

It will be observed that the statute merely requires that the trust should be *manifested and proved* by writing. Therefore a subsequent written acknowledgment, signed by the person who but for such declaration would be beneficial owner, is sufficient whenever made, even after a bankruptcy, if *bonâ fide* (*f*), and it has relation to the creation of the trust. An answer in Chancery is sufficient (*g*), and as the defendant's statement in the County Court is required to be signed, it will also be sufficient. Not only the fact of the trust, but also its terms, must appear from the signed writing, or from some writing

Subsequent written acknowledgment sufficient.

(*d*) Bill v. Cureton 2 My. & K. 503; Jones v. Lock, 11 Jur. N. S. 913; 1 Law R. Ch. Ap. 25.

(*e*) Peckham v. Taylor, 6 L. T. N. S. 487; Jones v. Lock (*loc. cit.*)

(*f*) Gardner v. Rowe, 2 S. & Stu. 346; 5 Russ. 258.

(*g*) Hampton v. Spencer, 2 Vern. 288.

clearly connected with and referred to in such signed writing (*h*). With regard to letters and loose acknowledgments, it must be clearly proved that they relate to the subject in question (*k*).

The statute applies to copyholds (*l*) and to chattels real (*m*).

Who may be a trustee.] There is hardly any restriction upon the capacity to be a trustee. But lands should not be conveyed to an alien upon trust, since this would render them liable to be seized by the Crown (*n*). Infants (*o*) and married women (*p*) are not fit persons to be made trustees, and even a *feme sole* has been refused to be appointed by the Court (*q*).

Aliens.

Infants.

Females.

When new trustees are appointed, it is not desirable to appoint any of the *cestuis que trustent*, and one judge in general refuses to allow relatives of the *cestuis que trustent* to be appointed (*r*). But if no equally fit person can be induced to act, or if there are other special circumstances, a *cestui que trust* or relative may be appointed (*s*).

Cestuis que trustent and their relatives.

A husband may be constituted by a third person, or by appropriate language may constitute himself, a trustee for his wife (*t*).

Who may be cestuis que trustent.] Not only may every person not disqualified from taking property take an interest as a *cestui que trust*, but trusts may be created in favour of classes of objects, as the poor of the parish of S. (*u*). But an alien cannot evade the law by taking a conveyance of land in the name of a trustee (*v*). And persons not yet *in esse* may be the objects of a

(*h*) Smith v. Matthews, 7 Jur. N. S. 378.
(*k*) Forster v. Hale, 3 Ves. 708.
(*l*) See Lewin on Trusts, p. 42.
(*m*) Skett v. Whitmore, Freem. 280.
(*n*) Fish v. Klein, 2 Mer. 431.
(*o*) Hearle v. Greenbank, 3 Atk. 695; 1 Ves. 298.
(*p*) Lake v. De Lambert, 4 Ves. 595, per Lord Loughborough.
(*q*) Brook v. Brook, 1 Beav. 531.
(*r*) Wilding v. Bolder, 21 Beav. 222.
(*s*) *Ex parte* Clutton, 17 Jur. 988.
(*t*) Grant v. Grant, 6 N. R. 347.
(*u*) Gilbert on Uses, p. 44.
(*v*) King v. Holland, Al. 16; Roll. Abr. 194, pl. 8.

Power in the nature of a trust.

trust, though not if they be illegitimate children not yet born or *in ventre* (*w*). Property is sometimes given to a class in such proportions as a third person nominated by the settlor shall appoint. If in such a case there is no gift over in default of appointment, the power is considered as partaking of the nature of a trust, and if the donee fail to exercise it, the Court will do so for him, and will distribute the property amongst all the members of the class equally (*x*).

By what words a trust may be created.] In order to create a trust, some words importing confidence are in general necessary, and the word "trust" is the most apt and most frequently employed. But in a will not only words importing trust, but also precatory words, *i. e.*, words of entreaty, recommendation, hope, or belief, are sufficient to raise a trust, provided—1. That the words are so used that on the whole they ought to be considered as imperative; 2. That the subject-matter of the recommendation or wish is certain; 3. That the objects, that is the persons intended to have the benefit of the recommendation or wish, are also certain (*y*).

Precatory trusts.

Qustions of construction.

Questions of construction, such as those just mentioned, arise both in suits for administration and in suits for executing trusts. In fact, the determination of such questions is more properly an incident of the latter kind of suit than of the former, and in an administration suit it is only after the estate has been cleared by the process of administration and the net assets ascertained, which remain to be distributed according to the directions of the testator's will, that is, when the suit is reduced to a suit for the execution of trusts,—that questions of construction are in general argued and decided. This explains how

(*w*) Pratt v. Mathew, 22 Beav. 328.

(*x*) Harding v. Glyn, 1 Atk. 469; Izod v. Izod, 1 N. R. 462; Brown v. Higgs, 5 Ves. 495; 8 Ves. 561.

(*y*) Knight v. Knight, 3 Beav. 172; S. C. confirmed in D. P. *sub nom.* Knight v. Boughton, 11 Cl. & Fin. 513. The older cases cannot be entirely relied upon.

it is that these questions generally present themselves in the former class of suits on further consideration, in the latter at the hearing. (See the Chapter on Administration.)

Voluntary settlements.] Where there is no valuable or quasi-valuable consideration moving the author of the settlement, difficult questions sometimes arise. Equity in the case of a trust agreed to be created for consideration of money or marriage is active to perfect it at the suit of the trustees or of the beneficiaries on the ground of contract. But a voluntary agreement will not be completed or assisted by a Court of Equity; in cases of mere gift, if anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it from the donor; the donee has no right to claim more than he has received (*z*). It is on these principles that the doctrine of the Court of Chancery is founded. Where, therefore, in order to carry out the intention of the voluntary settlor in the manner in which he intended to carry it out, some act remains to be done by him, the performance of that act will not be compelled in equity, and the trustees and others will be left to such remedy, if any, as they have at law. Thus, if A. agree, or even covenant by deed, to convey Blackacre to B. in fee, upon trusts in favour of C. and his children, A. cannot be compelled in equity to perform his covenant, and if he fail to do so no trust will attach to Blackacre, and the only remedy for the covenantee is an action on the covenant for damages (*a*). So also if A., having the legal estate, for no valuable consideration, attempts to convey it in a mode not applicable to it and fails, or if, according to one judge, having the equitable estate, he purports to convey the legal estate,

Voluntary agreement not enforced in equity.

(*z*) Dillwyn v. Llewellyn, 31 L. J. Ch. 658; see per Westbury, L. C., p. 659.

(*a*) Ward v. Audland, 8 Sim. 571; 16 Mee. & W. 862; and see Fletcher v. Fletcher, 4 Ha. 67.

no trust is created (*b*); though it would seem to be the opinion of other judges that if the legal estate is outstanding, and the instrument purports to be a conveyance in fee, the equitable fee passes, as nothing more remains to be done by the settlor (*c*). There is comparatively little difficulty in applying this doctrine to legal interests capable of transfer at law, and to equitable interests; and, as to the latter, notice to the trustees is immaterial as against the settlor (*d*). And as to legal interests, incapable of legal transfer, as *choses in action*, the better opinion is, that if the settlor make all the assignment in his power, and perfect the transaction as far as the law permits, the trust will be enforced against him (*e*). Stock, shares, &c., being capable of alienation in manner provided by statute, do not come under the last rule.

Voluntary settlement of *choses in action*,

stock, shares, &c.

Voluntary declaration of trust.

The doctrine under consideration has no application where the settlor has intended to convert himself into a trustee, and has made or executed a clear declaration of trust (*f*). But it must clearly appear that such declaration was, and was intended by the settlor to be, final, and that it was not a mere private memorandum or act of deliberation. Thus, it is easy to suppose that a father might intend to devote a certain fund to a child, and might keep separate accounts of it, and even use such expressions as "A. B.'s fund," or "A. B.'s money," and yet have no intention of constituting himself a trustee for the child (*g*).

Creditors' deeds.] The case of deeds for the benefit of creditors forms an exception, real or

(*b*) Bridge v. Bridge, 16 Beav. 315.

(*c*) See Kekewich v. Manning, 1 De G. M. & G. 187; *Re* Way's Trusts, 34 L. J. Ch. 49, on appeal, reversing S. C., 4 N. R. 453, and *quære* whether Bridge v. Bridge (*loc. cit.*) is not thereby in effect overruled. See also Sug. V. & P. 392 (13th edition).

(*d*) *Re* Way's Trusts (*loc. cit.*); Donaldson v. Donaldson, 1 Kay, 711.

(*e*) Per Knight Bruce, L. J., in Kekewich v. Manning, 1 De G. M. & G. 188, and see Lewin, p. 59, where the cases are collected.

(*f*) *Ex parte* Pye, 18 Ves. 140.

(*g*) Jones v. Lock, 11 Jur. N. S. 913; 1 Law R. Ch. Ap. 25; Dipple v. Corles, 11 Ha. 183.

apparent, to the rule, that where property is effectually and legally vested in the trustee, the disposition is binding on the settlor. If a debtor conveys property in trust for the benefit of his creditors, and the creditors are not in any way parties or privies to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent or communication by him to the creditors had recalled the money so delivered (*gg*). But a communication by the trustees to the creditors (*h*), or some of them (*k*), of the fact of the trust will defeat the power of revocation by the debtor, and enable the creditor, as a *cestui que trust*, to institute a suit on behalf of himself and all other the *cestuis que trustent* to execute the trusts of the deed. If the trustee be himself a creditor, the deed is irrevocable as soon as it is communicated to him (*l*).

When trust for creditors revocable.

when not.

Form of plaint.

If the deed imposes obligations on the creditors who execute, then, although it is expressed to be only for the benefit of those who execute within a given time, any creditor who, with the debtor's assent or acquiescence, acts upon the deed, as, for instance, by forbearing to sue on the faith of it, will be considered in equity as having duly executed it, though he may not in fact have executed within the time limited or at all (*m*). But no one can be considered as having constructively executed unless he has done some overt act indicative of an intention to put himself in the same situation as if he had executed: and *a fortiori* he cannot be deemed to have acceded if his

Construction by creditors.

(*g g*) Acton v. Woodgate, 2 My. & K. 495.
(*h*) Acton v. Woodgate (*loc. cit.*); Browne v. Cavendish, 1 Jo. & Lat. 635.
(*k*) Nicholson v. Tutin, 2 K. & J. 18.
(*l*) Siggers v. Evans, 5 E. & B. 367.
(*m*) Nicholson v. Tutin (*loc. cit.*); Whitmore v. Turquand, 30 L. J. Ch. 345.

conduct has been inconsistent with what would have been his obligations under the deed (*o*).

In such a deed a release of the debtor, though not expressed, may be implied from its nature; as, for instance, if it proceeds upon a complete *cessio bonorum* and the debtor has fairly and honestly acted accordingly (*p*).

Registration of creditors' deeds.

By the 194th section of the Bankruptcy Act, 1861 (*q*), every trust, composition or inspectorship deed, whether intended to operate against non-assenting creditors under the 192nd section or not, must, within twenty-eight days from the execution by the debtor, or within such further time as the Court of Bankruptcy in London allows, be registered at the chief registrar's office, otherwise it cannot be given in evidence (*r*).

A creditor's deed, duly registered and binding as against the debtor, is good against all the creditors whether assenting or not, unless it is set aside by an adjudication of bankruptcy. For a *cessio bonorum* is in general an act of bankruptcy, and may ground a petition within twelve months (*s*), or the deed may be overreached by a petition grounded on a prior act of bankruptcy. But if the deed comply with the requirements of the 192nd section, or is approved by the Court under the 187th section, it is forthwith completely valid and effectual.

Jurisdiction in bankruptcy over trust deeds.

Although, by the 197th section of the Act of 1861, the Court of Bankruptcy has jurisdiction, where a creditor's deed has been executed, the jurisdiction of the Court of Chancery, and therefore of the County Court, does not seem to be excluded. And as the jurisdiction of the County Court in bankruptcy only extends to cases where the property to be administered is less than 300*l.*, while the jurisdiction in equity extends to 500*l.*,

(*o*) Forbes v. Limood, 4 De G. M. & G.
(*p*) Whitmore v. Turquand (*loc. cit.*)
(*q*) 24 & 25 Vict. c. 134.
(*r*) As to the stamp, see sect. 195.
(*s*) 12 & 13 Vict. c. 106, s. 88.

it is not unlikely that the equitable jurisdiction of the County Courts in such matters will be frequently resorted to. The proceedings in such cases will bear a strong resemblance to those in administration suits, as to which see *ante*, Part II., Chap. I.

Resulting trusts.] Where a settlor conveys the legal interest to a trustee, and the whole or some part of the beneficial interest is undisposed of, while it appears that the trustee was not intended to enjoy it, such beneficial interest results to the settlor or his representatives. If the conveyance purport to have been made to the grantee as to the whole expressly upon trust (*t*), the presumption that he was not intended to take any beneficial interest arises from the written instrument itself, and cannot be rebutted by parol evidence (*u*). But if the presumption is based on the fact that the conveyance is made to a person, not being the wife or child of the settlor, for no consideration, or that trusts are declared which originally or eventually fail to exhaust the whole beneficial interest, this is a mere presumption of law raised against the words of the instrument, and may be rebutted by parol evidence shewing what the settlor's intention really was (*v*). But parol evidence is admissible to support it (*w*).

Parol evidence rebutting resulting trust.

After the settlor's death, such undisposed of interest goes, if in personalty, or in land directed to be purchased out of the personal estate, to the executor (*x*) as personal estate (*y*), and if in realty, or in money to arise from the sale of land, to the heir at law (*z*), but as personal estate, unless the purposes for which the conversion is directed wholly fail (*a*).

Devolution of resulting benefit.

(*t*) Dawson v. Clarke, 18 Ves. 254, per Lord Eldon.
(*u*) Langham v. Sanford, 17 Ves. 442, 19 Ves. 643.
(*v*) Barrs v. Fewkes, 6 N. R. 355; Cook v. Hutchinson, 1 Kee. 50.
(*w*) Davies v. Otty, 5 N. R. 391.
(*x*) Cogan v. Stevens, 5 L. J. N. S. Ch. 17; Hereford v. Ravenhill, 1 Beav. 481.
(*y*) Head v. Godlee, 1 Johns, 536.
(*z*) Ackroyd v. Smithson, 1 Bro. C. C. 503.
(*a*) Smith v. Claxton, 4 Mad. 484.

Purchases in the name of another.] Upon any purchase of property the equitable presumption is, that the beneficial interest was intended to belong to the person who provides the purchase-money. It makes no difference, "whether the purchase was taken in the name of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name, or in several; whether jointly or *successive*" (*b*).

Parol evidence.

Parol evidence is admissible to shew from what source the money really came, and the receipt clause of the purchase deed is not conclusive (*c*). But the presumption thus raised may be rebutted by parol evidence shewing what the intention of the parties to the transaction really was, or by the circumstances of the case. Thus it may appear that the money was lent to the ostensible purchaser to enable him to purchase for himself (*d*), or that a gift to him of the whole or some part of the beneficial interest was the object which the person providing the money had in view (*e*).

Purchase in name of child,

So also, if the conveyance be taken in the name of a child, the relationship is sufficient to throw upon the parent the burden of proving that the purchase was not intended as a gift to the child (*f*). Neither the circumstance of the child being an infant (*g*), or of the property being conveyed to him and the parent jointly (*h*), or that the child is merely inserted as one of several lives in a lease or grant of copyholds (*k*), or that the child was adult, and that the parent has always dealt with the estate as his own, is sufficient to shift the onus back again (*l*). The fact that the son is completely emancipated, *e. g.*, as if he has an independent income and a house of his

(*b*) Dyer v. Dyer, 2 Cox, 93.
(*c*) Ryall v. Ryall, 1 Atk. 59; Lench v. Lench, 10 Ves. 517.
(*d*) Bartlett v. Pickersgill, 1 Ed. 516.
(*e*) Benbow v. Townsend, 1 My. & K. 506.
(*f*) Dyer v. Dyer, 2 Cox, 94.
(*g*) Finch v. Finch, 15 Ves. 43.
(*h*) Grey v. Grey, 2 Sw. 594; Finch, 338.
(*k*) Jeans v. Cooke, 24 Beav. 513.
(*l*) Grey v. Grey (*loc. cit.*)

own, is a material, but not a conclusive, circumstance in favour of the parent (*m*). The acts and declarations of the parent made at the time of the transaction or immediately after it are evidence on either side (*n*). The subsequent acts and declarations of the parent and of the son, provided he were a party to the purchase, are evidence against but not for them respectively (*o*).

The above rules have been applied also where the conveyance was taken in the name of a wife (*p*), grandchild (*q*), nephew (*r*), or of one toward whom the person providing the money had put himself *in loco parentis*, *e. g.*, an adopted child, or an illegitimate child brought up as if he were legitimate, and for whom he had shewn an intention to provide (*s*). wife, grandchild, &c.

Purchases by several as joint tenants.] Where two or more persons advance money in unequal proportions to effect a purchase, and the conveyance is taken in such a way as to make them at law joint tenants, they are nevertheless *primâ facie* tenants in common in equity, and the survivors will be held trustees of the legal estate for the representatives of a deceased joint tenant (*t*). The Statute of Frauds does not apply to exclude parol evidence of the proportions in which the money was advanced, but parol evidence is also admissible to rebut the equitable presumption (*u*).

Constructive trusts.] The trusts to which we have already referred are founded upon the intention of the parties, either expressed or implied from their acts or silence. But there are cases in which the terms trust, trustee, &c., are employed

(*m*) Grey v. Grey (*loc. cit.*)
(*n*) Redington v. Redington, 3 Ridgw. 196; Murless v. Franklin, 1 Swanst. 17; Devoy v. Devoy, 3 Sm. & Gif. 403.
(*o*) Pole v. Pole, 1 Ves. 76; Sidmouth v. Sidmouth, 2 Beav. 455.
(*p*) Dummer v. Pitcher, 2 My. & K. 262.
(*q*) Ebrand v. Dancer, 2 Ch. Ca. 1.
(*r*) Currant v. Jago, 1 Coll. 261.
(*s*) See Beecher v. Major, 6 N. R. 139.
(*t*) Lake v. Gibson, 1 Eq. Ca. Abr. 291, per Sir J. Jekyll; 3 P. Wms. 158.
(*u*) See the cases on parol evidence just cited.

by way of analogy only, and because the circumstances are such that the law, in the absence of intention, gives similar rights and imposes similar obligations to those which would arise in the case of a trust properly so called. Persons against whom these principles are applied are called *constructive* trustees. Speaking generally, it may be said that whenever one person standing in a fiduciary relation to another gains an advantage for himself at the expense of the other or by virtue of the relation, he will be treated as a trustee for that other of the benefit so obtained.

Cestuis que trustent may either take property purchased with trust money,

Trust property tortiously converted.] As between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by or through a purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property whether in its original or altered state, continues to be subject to or affected by the trust (*v*). But where trust monies have been tortiously converted into other property, as land, the *cestui que trust* may elect not to take such property *in specie*, but to charge the trustee personally with the money wrongfully applied (*w*), and to take a lien only upon the property for the amount (*x*). And from the nature of the case he can in general have no other remedy when the money has been applied in conjunction with other moneys (*y*), although, if the trustee has mixed the trust monies with his own and employed the blended fund in the purchase of land, it is conceived that the *cestui que trust* would be entitled to take the land and all its fruits on paying the trustee his money with interest. So also if a trustee improperly pay the trust monies to his own private account at a banker's, and

or may charge the trustee personally, taking a lien for the money.

Trustee mixing trust monies with his own.

(*v*) Pennell v. Deffell, 4 De G. M. & G. 372, 388.
(*w*) Clough v. Bond, 3 My. & Cr. 496.
(*x*) Taylor v. Plumer, 3 Maul. & Sel. 562.
(*y*) Lane v. Dighton, Amb. 409; Scales v. Baker, 28 Beav. 91.

hus combine them with his own, the trust nonies will nevertheless continue impressed vith the trust, so long as they or the items of :redit in the account arising from them continue n existence (*z*). But, if cheques are drawn against the account generally, the earliest items of debit will be set off against the earliest item of credit, and so on in order of date, without regard to the source whence such items of credit come (*a*).

Appropriation of payments. Rule in *Clayton's Case.*

This right of following the trust property does not prevent the *cestui que trust* from disaffirming the conversion and proceeding against the trustee personally. As to this see *infra*, p. 117, *et seq.*

Renewable leaseholds.] A person who comes into possession of leasehold property renewable either by contract or custom, *in auter droit*, *e. g.* as trustee (*b*), or executor (*c*), or even as executor *de son tort* (*d*), will not be allowed to appropriate to himself the benefit of the tenant-right, and therefore if he obtain a renewal he will hold the renewed lease upon the same trusts as the old lease was held upon. And the same rule applies to a tenant for life, and others standing in a fiduciary relation to the beneficial owners (*e*). But the trustee &c., is entitled to be recouped the expenses of renewal and has a lien on the property for the amount (*f*).

Trustee renewing leasehold, holds new lease on same trusts as the old.

Factors, agents, &c.] So also a factor (*g*) or agent (*h*), who in breach of good faith makes a profit at the expense of his principal, or a partner who does the like at the expense of his co-part-

(*z*) Pennell v. Deffell, 4 De G. M. & G. 372.
(*a*) Clayton's case, 1 Mer. 572.
(*b*) The Romford Market Case, Sel. Ch. Ca. 61; and see Kendall v. Marsters, 2 D. G. F. & J. 200.
(*c*) Walley v. Whalley, 1 Vern. 484.
(*d*) Mulvany v. Dillon, 1 Ba. & Be. 409.
(*e*) Giddings v. Giddings, 3 Russ. 241.
(*f*) Giddings v. Giddings (*loc. cit.*); James v. Dean, 11 Ves. 383.
(*g*) East India Company v. Henchman, 1 Ves. Jr. 287, 8 Bro. P. C. 85.
(*h*) Gillett v. Peppercorn, 3 Beav. 78.

ner (*k*), may be made to account as a trustee. But where a person is properly speaking a trustee, his agent is accountable to him alone unless he steps beyond his character as agent so as to injure the estate (*l*). Directors of a public Company are trustees for the shareholders, and if they, in carrying out an amalgamation with another Company, agree for a bonus to themselves as directors, they will be compelled to account for that bonus to their shareholders (*m*).

Directors taking bonus.

Acceptance and disclaimer by trustee.] A person who is nominated a trustee does not in fact become such unless he accept the trust, but such acceptance is assumed if he fails to repudiate it when it has come to his knowledge, and is of course evidenced by his executing the trust deed, by his declaration of assent, or by his acting in the trust. The nomination of the trustee is generally contemporaneous with the vesting of an estate in the trustee, and the doctrine of law which assumes that an estate is accepted and vests unless it is disclaimed, has moulded the expressions of judges as to acceptance of trusts.

Acceptance of office.

An executor who is also made a trustee of the will cannot accept the office of executor and repudiate that of trustee (*o*). Nor can a person who by one instrument is nominated a trustee of two distinct trusts, accept one trust and decline the other (*p*).

Disclaimer is merely a refusal to take the office of trustee. It may be proved either by the trustee disclaiming as of record by his answer or in Court by himself or his counsel, or by deed, or by any other conduct clearly inconsistent with an acceptance of the trust (*q*). But there must be some act or deed of disclaimer to divest the trust

Disclaimer of office.

Disclaimer of estate.

(*k*) Bentley v. Craven, 18 Beav. 75.
(*l*) Morgan v. Stephens, 3 Gif. 226.
(*m*) Gaskell v. Chambers, 26 Beav. 360.
(*n*) King v. Phillips, 22 Law J. N. S. Ch. 422.
(*o*) Mucklow v. Fuller, Jac. 198; Ward v. Butler, 2 Moll. 533.
(*p*) Urch v. Walker, 3 My. & Cr. 702.
(*q*) Stacey v. Elph, 1 M. & K. 195.

state. A disclaimer at bar by the respondent to petition is not matter of record, and has no more effect than a mere parol disclaimer. V. C. Wood therefore doubted, in *Re Ellison's Trust* (*r*), whether such disclaimer was sufficient. But it would seem that it was held sufficient by V. C. Lindersley in *Foster* v. *Dawber* (*s*). By the 20 & 9 Vict. c. 106, s. 7, a married woman may disclaim an estate in land by deed acknowledged in which her husband concurs, and in case of trust estate it is the best course to be adopted.

Disclaimer of estate by *feme coverte.*

An heir at law cannot disclaim the estate which descends upon him (*t*). The contrary might be inferred from the language of the form of defendant's statement. (Form 19).

Heir-at-law cannot disclaim.

Quasi trustee.] A person who without any authority assumes to act as trustee incurs the same liabilities as if he had been duly constituted (*u*).

SUITS FOR THE EXECUTION OF TRUSTS.

Parties.] The general rule in all suits between trustees and *cestuis que trustent* relating to the trust estate is, that all the trustees, including persons appointed trustees through no conveyance has been made to them and all the *cestuis que trustent*, must be parties, but no one claiming by title paramount should be a party (*v*). This principle is subject to exceptions either arising from the necessity of the case or depending upon the statutory rule contained in 15 & 16 Vict. c. 86 (*w*).

All the trustees and all the *cestuis que trustent* should be parties.

Exceptions.

(*r*) 2 Jur. N. S. 62.

(*s*) 1 Dr. & Sm. 172. It does not, however, appear from the report whether a vesting order of the legal estate was made in that case.

(*t*) See Watkins on Descents, 25, 26.

(*u*) Rackham v. Siddall, 16 Sim. 297, 1 Mac. & G. 607; Life Association of Scotland v. Siddall, 7 Jur. 785.

(*v*) Attorney General v. Portreeve, &c., of Avon, 33 L. J. Ch. 172; Nelson v. Seaman, 1 De G. F. & J. 368.

(*w*) Sect. 42.

The applications of this general principle, as well as the exceptions from it, will appear in the particular cases about to be considered.

Trustee plaintiff.] Trustees have a clear right to come to the Court and seek its aid and protection in administering the trusts in all cases of doubt or difficulty (*x*). And a trustee, who has accepted the office, can in the absence of special powers obtain a release from it only by application to the Court (*y*).

Trustee retiring without good reason must pay the costs of a suit to discharge him;

But unless there are special circumstances inducing the trustee to wish to retire, which did not exist at the time when he accepted the trust, as, for instance, if he has become old and infirm, or if the trust has turned out much more complicated than he had at first any reason to suppose (*z*), he must pay the costs of the suit or other proceeding which he institutes, though Form No. 5 might lead to a different inference (*a*). If no other fit person can be found he may even be compelled to continue a trustee (*b*).

but not if he is merely the representative of a deceased trustee.

These remarks must not be applied to the real or personal representative of the original trustee, for an executor of a surviving trustee has been held entitled to refuse to act, and to have the costs of a suit instituted against him in consequence of his refusal (*c*). In such a case the estate or fund may be reached under the Trustee Acts without suit.

Plaint by trustee.

A plaint by a trustee should therefore always allege the special circumstance under which the plaintiff conceives himself entitled to come to the Court, and if he choose a more expensive mode of appealing to the Court than is necessary —if, for instance, he file a plaint merely to appoint new trustees, in which case a petition under the Trustee Acts would in general suffice,—

Trustees must not raise their case so as to cause unnecessary expense.

(*x*) Greenwood v. Wakeford, 1 Beav. 576.
(*y*) Hamilton v. Fry, 2 Moll. 458.
(*z*) Barker v. Peile, 5 N. R. 425.
(*a*) Howard v. Rhodes, 1 Kee. 581.
(*b*) See Ardill v. Savage, 1 Ir. Eq. Rep. 79.
(*c*) Legg v. Mackrell, 2 De G. F. & J. 551.

e may, even if held entitled to some costs, be llowed those only which the less expensive ourse of proceeding would have entailed (*d*). But since a trustee is not completely discharged y payment into Court under the Trustees Relief Act, he is entitled to institute a suit if the cir- umstances are such as entitle him to relinquish he trust (*e*). In general the instrument consti- uting the trust contains power for new trustees o be appointed in the event of a trustee retiring, nd this is by Lord Cranworth's Act, 23 & 24 Vict. . 145 (*f*), extended to all instruments executed fter the 28th of August, 1860.

By 15 & 16 Vict. c. 86, s. 42, r. 6, a trustee nay obtain a decree for the execution of the rusts against any one *cestui que trust*, but all the co-trustees must be parties.

Where the case is such as to entitle trustees to file a plaint, they ought to join as co-plaintiffs, and if any refuse to do so without good reason the parties refusing will have to bear their own costs (*g*). And therefore they should join in suing.

In all cases where the object of a suit is the determining of doubtful claims, all persons having a real or apparent interest should be made parties. In such cases the Court of Chancery is ready to assist by allowing parties to be added by amendment, if on the opening of the matter it thinks that they are not so clearly without interest that the case ought to be heard in their absence; and this is one of the cases in which the Court has always been in the habit of giving leave for amendments at the hearing of the cause (*h*). Parties having doubtful claims.

Suit by cestui que trust.] Where a trust has been completely established, the object of a bill or plaint filed by a *cestui que trust* may either be the establishment of the plaintiff's title, or the protection or reinstatement of the trust property,

(*d*) Wells v. Malbon, 8 Jur. 249.
(*e*) Barker v. Peile, 5 N. R. 425.
(*f*) Sect. 27.
(*g*) Hughes v. Key, 20 Beav. 397.
(*h*) Watts v. Hyde, 2 Ph. 406.

In the former case, the suit will resemble, as to parties and other matters, a suit instituted under similar circumstances by a trustee.

Cestui que trust entitled to have estate proected.

As to the protection of the estate, a *cestui que trust*, though his right is only in remainder, is entitled to require the property to be committed to a sufficient number of proper persons (*k*). Thus where there is only one trustee he can almost always require at least one more to be appointed (*l*), and in general he can insist that the original number be kept up (*m*). And further, he may require the removal of a person who becomes unable from change of circumstances any longer adequately to discharge the duties of a trustee; as where a person becomes permanently resident abroad (*n*), or becomes unfit by reason of dishonest or suspicious conduct, as absconding under a charge of forgery (*o*), or by reason of misfortune, as by being in embarrassed circumstances (*p*). The mere fact of bankruptcy is of itself a reason for removing a trustee, whose place can be filled up (*q*); but if he has obtained a certificate, and some time has elapsed, the previous bankruptcy is not sufficient to warrant the removal (*r*). Indeed, if the interests of the trust require it, a trustee will be removed in a case in which there is no imputation against him, as if he is a person with whom his co-trustees find it impossible to act (*s*).

Keeping up number of trustees.

Removal of trustees.

Must be by plaint.

The removal of a trustee against his will can only be done by bill or plaint (*t*); but in almost

(*k*) Finlay v. Howard, 2 Dru. & War. 490. See also Cole v. Moore, Moore, 806.

(*l*) Grant v. Grant, 6 N. R. 347.

(*m*) Hulme'v. Hulme, 2 My. & K. 682, and see Ex parte Davis, 2 Y. & C. C. C. 468, 3 Mont. D. & D. 304.

(*n*) O'Reilly v. Alderson, 8 Ha. 101.

(*o*) Millard v. Eyre, 2 Ves. Jr. 94.

(*p*) Harris v. Harris, 9 W. R. 444.

(*q*) Bainbrigg v. Blair, 1 Beav.

(*r*) In Dawe v. Reed, 7 Nov. 1845, V. C. E. refused to remove a trustee who had been bankrupt eleven years before. In Re Hugman, 1 Dr. & Sm. 164, five years had elapsed.

(*s*) Uvedale v. Ettrick, 2 Ch. Ca. 130.

(*t*) Re Blanchard, 7 Jur. 505.

all other cases new trustees may be appointed under the Trustee Acts. As to these statutes, see *infra*. And a suit should not be had recourse to where the statutory jurisdiction is clearly adequate (*u*).

Cestui que trust requiring to use name of trustee.

A *cestui que trust* on giving a proper indemnity can call upon his trustees to permit their names to be used in proceedings at law, and if they refuse may file a plaint to compel them, of which they will have to pay the costs if the indemnity offered was sufficient (*v*). So also a *cestui que trust* may obtain an injunction to prevent a trustee from improperly using his legal rights, and in general he can directly or indirectly compel the performance of acts necessary to the preservation of the property (*w*). Thus if a tenant for life of renewable leaseholds enjoy them on the express condition of renewing, the Court would, if he had evinced an intention not to renew, appoint a receiver of the rents and profits (*x*).

Injunction against trustee.

When Court will administer the estate.

A *cestui que trust* can, in any of the cases in which an application by him for the removal of existing or the appointment of new trustees is entertained, ask instead that the Court itself shall execute the trust and administer the estate or funds, and if there is no preponderance of interested parties who desire the trust to be executed by new trustees, the Court will execute the trust, will appoint a receiver and manager of estates or businesses, and transfer trust funds into Court, and pay the income, dividends, &c., to the *cestui que trust* by means of the receiver or the Accountant General.

Suits to repair breach of trust—Duties of trustees.] A *cestui que trust* may also institute a suit in order to repair a breach of trust, which is a suit for the execution of the trust within the

(*u*) Thomas v. Walker, 18 Beav. 521.
(*v*) See Fletcher v. Fletcher, 4 Ha. 78.
(*w*) Anon., 6 Mad. 10.
(*x*) Bennet v. Colley, 5 Sim. 192; S C. 2 My & K. 253.

15 & 16 Vict. c. 86, s. 42, rule 6 (*y*), and therefore within the jurisdiction conferred on the County Court. As to his right to follow the property, see *ante*, p. 111. And the term breach of trust is not confined to cases of fraudulent dealing, but extends to all cases where a trustee neglects the duties which equity imposes upon him, or acts contrary to them. Where the management, realisation or custody of property devolves upon him, he must act with that care and diligence which a *bonus paterfamilias* would employ in his own affairs; he is not bound by the measure of what the *most* prudent or the *most* cautious man would have done (*z*). Still less can he be called upon to make good losses arising from *vis major*, or from unavoidable accidents.

Trustee must act as a *bonus paterfamilias*.

As to how far a trustee is bound to file a bill against a co-trustee to recover a fund lost by that co-trustee, see Lord Cottenham's observations in *Damer* v. *Earl of Portarlington*, 2 Phillips, 30 (see p. 33), and observations of V. C. Wood in *Mendes* v. *Guedalla*, 2 J. & H. 259 (see p. 276), and in *Taylor* v *Millington*, 4 Jur. N. S. 204. It is by far the best course for trustees, under such circumstances, before filing such a bill, to ask the Court, under the 22 & 23 Vict. c. 35 (*a*), if they should do so.

Application for advice under Lord St. Leonards Act.

When, however, the trust is to distribute presently, the distribution is entirely at the trustee's risk, so that if he pay over money on forged certificates of marriage or birth, he will in any case be liable to make it good to a person really entitled, and who is not in any way privy to the fraud, in the same way as if he had been a mere debtor (*b*).

Trustee distributes estate entirely at his own risk.

In accordance with these principles, it has been held that a trustee under a mere equitable assignment, *e. g.* of a *chose in action*, is bound to

Trustee not having legal in-

(*y*) Macleod v. Annesley, 16 Beav. 600.

(*z*) Jones v. Lewis, 2 Ves. 241; Massey v. Banner, 1 J. & W. 247.

(*a*) Sect. 30.

(*b*) Eaves v. Hickson, 30 Beav. 136.

give notice to the holder of the legal interest, as the debtor, in order as far as possible to prevent a subsequent incumbrancer gaining a priority (*c*). And where it is possible, a conveyance of the legal interest should be compelled. So trustees of a testator's residuary personalty will be responsible, if they suffer money to remain outstanding on personal security, or indeed on any security not of that character which the Court would permit (*d*), (see *infra*, p. 120), except so far as they have express authority. There is, however, no objection to trust money being lodged at a banker's temporarily, even although it is placed to a deposit account (*e*): *secus*, if the deposit was intended as a permanent investment (*f*). But the trustee must not mix the trust money with his own; if he do so, all will be presumed to belong to the *cestui que trust* which he cannot prove is his own (*g*). Neither should he mix the funds of two separate trusts together.

terest must give notice.

Trustees of residuary personalty.

Trustee must not mix trust monies with his own.

It is the duty of a trustee of residuary personalty bequeathed to several persons in succession, to call in and convert into money all those parts of the estate which are outstanding upon securities not approved of by the Court as investments, and all those parts which consist of leaseholds, or other property of a wasting nature. The produce must be invested upon a security of the authorized class (*h*), but if the trust is to invest in Government securities, 5 per cent. stock has been permitted (*hh*). The rule, of course, gives way to an expressed or implied intention to the contrary.

Residuary personalty bequeathed to several persons in succession.

The interest arising from the payment of legacies being deferred for a year after the testator's death, forms part of the *corpus* of the residue (*k*).

Interest of legacies during executor's year.

(*c*) Jacob v. Lucas, 1 Beav. 436.
(*d*) Howe v. Earl of Dartmouth, 7 Ves. 137.
(*e*) Wilkins v. Hogg, 8 Jur. 25,
(*f*) Rehden v. Wesley, 29 Beav. 213.
(*g*) Lupton v. White, 15 Ves. 432.
(*h*) Howe v. Earl of Dartmouth, 7 Ves. 137.
(*hh*) Band v. Fardell, 7 D. G. M. & G. 628.
(*k*) Holgate v. Jennings, 24 Beav. 623.

Investments.] Formerly 3 per cent. Bank Annuities were the only securities upon which trustees, in the absence of any direction in the instrument constituting the trust, could safely invest trust money. The most usual directions in such instruments are to invest in Government or real securities (*l*). Since the 1st of February, 1861, trustees have, however, had the power, whether the instrument under which they act came into operation before or after that date, unless there is in it any direction to the contrary, to invest in Bank Stock, (old) East India Stock, Exchequer bills, £2. 10*s.* per cent. Annuities, and upon mortgage of freehold and copyhold estates in Great Britain, as well as in 3 per cent. Consols, 3 per cent. New, and 3 per cent. Reduced (*m*).

Present rule.

Where money is once properly invested according to the trust, if it is converted for the purpose of an improper investment the trustee is compellable to restore the first investment (*n*); otherwise, if the fund was not properly invested at all: in this case, if the fund is improperly invested, the trustee is only bound to put it in a proper investment (*o*).

The Court of Chancery, by a special order, has enlarged its power of investment in the same manner as trustees are enabled to extend their powers (*p*).

It would seem that the County Court may invest funds under its control in the same investments as the Court of Chancery can. Such investments will be in the names of the treasurer and registrar (*q*).

(*l*) Howe v. Earl of Dartmouth, 7 Ves. 150; Trafford v. Boehm, 3 Atk. 444.

(*m*) 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, ss. 10—12; Gen. Order of Feb. 1, 1861.

(*n*) Phillipson v. Gatty, 7 Ha. 516; Harrison v. Harrison, 2 Atk. 121.

(*o*) Robinson v. Robinson, 1 D. G. M. & G. 247.

(*p*) Order, Feb. 1, 1861. 23 & 24 Vict. c. 38, s. 10. As to the principles on which the Court of Chancery acts in changing an investment, see Cockburn v. Peel, 7 Jur. N. S. 810; Mortimer v. Picton, 3 N. R. 338.

(*q*) Ord. XVII., Rule 3.

Control of the trust property.] The trust fund must not unnecessarily, *i.e.*, where the ordinary course of business does not so require, be left under the exclusive control of a stranger, or of one or more of the trustees, to the exclusion of the rest. Thus, as money due to the trust cannot generally be paid except on a joint receipt, a trustee will not be responsible merely because he allows a co-trustee to receive the money on a receipt which he had previously signed; but he will be answerable if he allows the co-trustee to retain the fund (*r*). "There are," says Lord Westbury, in *Wilkins* v. *Hogg* (*s*), "three modes in which a trustee may become liable, according to the ordinary rules of the Court. First, where one trustee receives trust money and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution" (*t*) For similar reasons, shares which are required to be registered in the name of one proprietor only do not form a proper investment for trust money (*u*).

Trustee not liable merely for signing a receipt for conformity.

Shares in one name only not a proper investment.

Parties to a suit by cestui que trust.] Any one of several *cestuis que trustent* is entitled to a decree for the execution of the trust without the others being parties. They are served with notice of the decree (*v*).

Parties to a suit to repair a breach of trust.] All the trustees are liable to repair a breach of trust which it was their duty to have prevented (*w*); and all other persons who have been actively or

(*r*) Brice v. Stokes, 11 Ves. 319.
(*s*) 8 Jur. N. S. 25.
(*t*) See Mendes v. Guedella, 2 J. & H. 259.
(*u*) Consterdine v. Consterdine, 8 Jur. N. S., 906.
(*v*) 15 & 16 Vict. c. 86, s. 42. Rule 7.
(*w*) Wilson v. Moore, 1 My. & K. 146.

Interest of beneficiary concurring in breach of trust may be stopped.

knowingly participant in a breach of trust are likewise liable (*x*). And the interest of a tenant for life, or other person taking under the settlement, may, and, as it seems, whether legal or equitable, be impounded to make good a breach of trust (*y*); an equity which, in the case of personalty, may be enforced even against an assignee for value without notice, by virtue of the rule that an assignee of a *chose in action* takes it, subject to all its equities (*z*). The 68th section of the 9 & 10 Vict. c. 95, applies to such a demand; but it will, it is conceived, receive the same interpretation as the 2nd rule of the VIIth Consolidated Orders of the Court of Chancery, which has been held to apply only to cases in which an ascertained sum is demanded; not to cases in which a general account is sought (*a*), nor where the relief has been originally sought against a defendant jointly liable, which relief is waived at the hearing (*b*).

Plaint.] With reference to the framing the plaint, all that seems to call for special mention in this place is, that a trustee cannot be charged with wilful default except upon a case made by the plaint, and that one specific act of wilful default at least must be alleged and proved. See *ante*, p. 14.

Wilful default.

Where the object of the plaint is to fix the defendant with a constructive trust, the plaint should state, with that particularity and precision which the rules of pleading require, the facts which constitute the defendant such trustee, and should offer to pay such sums, give such indemnities, and generally do all such acts as the defendant is entitled to demand.

Thus a plaintiff claiming the benefit of a lease renewed by a trustee should offer to pay or allow the fines and other expenses of renewal, and the

(*x*) Pannell v. Hurley, 2 Coll. 241.
(*y*) Woodyatt v. Gresley, 8 Sim. 180.
(*z*) Cole v. Muddle, 10 Hare, 186.
(*a*) Coppard v. Allen, 4 N. R. 202.
(*b*) Fussell v. Elwin, 7 Hare, 39.

value of lasting improvements, if any have been made, with interest.

Defences.] Suits for the execution of trusts will be either to have the trust performed where there is a question as to the constitution of the trust, the character of the trust fund, or the mode in which the trustees shall perform it, or for supplying a defect, original or supervening, in the constitution of the trust, as for appointing new trustees (which latter will generally be obtained upon petition), or the suit will be to remedy a breach of trust.

Defences to these suits on behalf of the trustees, except when a breach of trust is charged, will hardly ever be raised. If a question of construction or of administration is raised, the trustees will leave it to the Court, and some of the remaining *cestuis que trustent* will alone argue the case against the plaintiff.

But suits to repair a breach of trust will generally be very stoutly defended, and whether instituted against the original trustees and their representatives, or against persons who by possessing the trust property with notice of the trust are constructive trustees, will involve on the part of the defendants all the defences which are usually relied on in hostile suits.

Lapse of time a bar in direct but not in constructive trust.

Lapse of time.] It is commonly said that lapse of time is no bar as between trustee and *cestui que trust* to a suit for breach of trust (*c*), but this is only true in reference to such trusts as are express and continuing (*d*). It does not apply where it is sought to fix a constructive trust on the defendant (*e*).

Where, however, a person holds property, as is admitted and proved, not for his own benefit, he cannot cause his possession to enure for the benefit of any other than his *cestui que trust*, so as to give some one else who claims under him possession adverse to the real *cestui que trust* (*f*).

(*c*) Bright v. Legerton, 7 Jur. N. S., 559.
(*d*) Obee v. Bishop, 1 De G. F. & J. 137.
(*e*) Clanricarde v. Hening, 30 Beav. 175.
(*f*) Lister v. Pickford, 6 N. R. 243.

Statute of Limitations.

If the suit is to recover any land or rent as belonging to the trust estate, it may be barred in some cases by the Statute of Limitations.

A trust apparent as resulting upon the face of a written instrument is an express trust within the exception of the 25th section (*g*).

If the person in possession claims adversely both to the trustee and the *cestui que trust*, the 25th section does not apply, and time runs from the dispossession of the trustee (*h*). In such a case, it seems that the *cestui que trust* has no further time, by reason of disability (*i*), or of his right being reversionary, but it seems that this is not the case where the possessor claims under the trustee, with actual or constructive notice of the trust (*j*).

Cestui que trust in reversion.

When time begins to run in cases of fraud.

The 26th section of the 3 & 4 Wm. 4, c. 27, enacts, that in cases of concealed fraud, the right shall be deemed to have first accrued at and not before the time when the fraud was, or with reasonable diligence might have been, known or discovered. This section applies to cases in which a trustee colludes with a stranger in fraudulently dealing with the trust estate (*k*).

Statute should be raised by notice.

As under the 34th section of the statute the right to the land or rent, and not the remedy merely, is extinguished, it has been held at law that it need not be specially pleaded (*l*). Perhaps, however, the defendant in equity should give special notice of it (*m*), unless the objection arising from it is disclosed in the plaint, when it may be available by the statement in nature of a demurrer (*mm*).

(*g*) 3 & 4 Wm. 4, c. 27.

(*h*) Burroughs v. McCreight, 1 Jo. & Lat. 290.

(*i*) See Llewellin v. Mackworth, 2 Eq. Ca. Abr. 579; Barn. 445, S. C.; Pentland v. Stokes, 2 Ba. & Be. 75.

(*j*) See Thompson v. Simpson, 1 Dru. & War. 489; Attorney General v. Magdalen College, 18 Beav. 239, 250, 6 H. of L. 189, see p. 215.

(*k*) Rolfe v. Gregory, 5 N. R. 257.

(*l*) Owen v. De Beauvoir, 16 M. & W. 547.

(*m*) See Wych v. East India Company, 3 P. Wms. 309; Lewis on Trusts, 565.

(*mm*) Form No. 19. See *supra*, Part I., p. 22.

With regard to *choses in action*, it seems clear that where the debt is made the subject of a trust, of which the debtor has no notice, the right of the *cestui que trust* to the debt will be barred by lapse of time, or extinguished by any other event which extinguishes the right of the legal creditor. *Chose in action.*

Release.] On the general nature of the defence grounded on a release, we have already had occasion to observe (*n*). It is, therefore, only necessary to say that the Court regards with some suspicion a release executed by a *cestui que trust* who has only just attained his majority, or who is for any other cause under the influence of the releasee (*o*). Such an instrument, if impeached, will not be allowed to have effect given to it, and will be treated as invalid (*p*), unless it is shewn that it was executed deliberately after the *cestui que trust* had had full information (*q*) and independent legal advice (*r*). A separate solicitor should in fact always act for the *cestui que trust*. Release by a person who has just come of age not favored.

We may here also observe that a trustee has no general right to insist upon a release as a condition precedent to paying over the fund to a person absolutely entitled, unless, perhaps, in a case where he has executed the trust deed (*rr*). Trustee cannot in general insist on a release.

Waiver and acquiescence.] A release is a waiver of rights by deed, but the rights may be otherwise waived, or the breach of trust acquiesced in.

A promise or expression or intention not to enforce certain rights, in whatever manner expressed, whether by words or by conduct, if founded on a substantial consideration given to

(*n*) *Supra*, p. 24.

(*o*) Kay v. Smith, 21 Beav. 522.

(*p*) It is important in the County Court, which has not the power to set aside deeds, to distinguish when a deed set up by a party may be disregarded, or when it must be set aside. See *supra*, p. 24.

(*q*) Adams v. Clifton, 1 Russ. 297.

(*r*) Lloyd v. Attwood, 3 De G. & J. 615.

(*rr*) Chadwick v. Heatley, 2 Coll. 137; Re Wright's Trust, 3 K. & J. 421. And see King v. Mullins, 1 Dr. 308, where under the circumstances, the trustee was held entitled to a release.

the party for not enforcing such rights, will be equivalent to a release (*s*).

Bankruptcy.] A certificate in bankruptcy discharges the liability of the bankrupt to make good a breach of trust which has before the certificate resulted in a pecuniary loss to the estate; but it is the duty of the bankrupt, as trustee, to prove against his own estate in respect of such breach, or to get some one else to do so; and if he neglect this duty, he will even after the certificate continue liable for so much as the proof would have produced (*t*).

Notice of the intention to set up a discharge as a bankrupt must be given.

Bonâ fide purchase without notice.] A person who without notice, actual or constructive, of the rights of the *cestui que trust*, purchases real estate for value from a trustee, express or constructive, can shield himself under this defence against the *cestui que trust* seeking to make him execute the trust by a suit in equity, even although he has not the legal estate, and therefore the next hour may be turned out of possession by the legal title (*u*).

Effect of instituting suit.] When a suit is instituted, the administration of the property is devolved upon the Court, and the trustees cannot exercise any powers or discretions conferred upon them without leave of the Court, under peril of having such acts set aside at their cost (*v*). However, the suit must be pending, and not have become abated by the death of the plaintiff or otherwise (*w*); and, of course, if the plaintiff chooses, as in all cases where he is not under disability he may, to dismiss his own plaint before setting it down for hearing with costs, the suit is at end (*x*).

Pending suit trustees, &c., can do no act except by leave of the Court.

(*s*) Duke of Leeds v. Earl Amherst, 2 Ph. 123; Stackhouse v. Barnston, 10 Ves. 466.
(*t*) Orrett v. Corser, 21 Beav. 52.
(*u*) Bowen v. Evans, 1 Jones & Lat. 179.
(*v*) Attorney General v. Clack, 1 Beav. 467.
(*w*) Drayson v. Pocock, 4 Sim. 283.
(*x*) Ord. II. r. 6.

If a married woman is party to a pending suit, the trustee, Lord Eldon said (*y*), cannot safely pay over money to her husband in her right, for her equity to a settlement might thus be defeated. But if the bill is dismissed, the trustee would, it seems, not be liable for paying the husband pending the suit (*z*).

If married woman a party, trustee may not pay her husband.

INTERLOCUTORY APPLICATIONS.

Payment into Court.] The defendant will be ordered to pay in money which he admits to have received, but alleges he has paid away in a manner which is a breach of trust (*a*), and also any ascertained amount due from him as a debt to the estate (*b*).

Receiver.] A receiver of the trust estate will be appointed wherever it seems to require protection; *e. g.*, if a sole trustee has been guilty of dishonesty, or even lies under grave suspicion (*c*), or from drunken habits (*d*), or infirmity (*e*), is unable to attend to business, or is bankrupt (*f*), or greatly embarrassed (*g*); not, however, merely because he is poor (*h*). So also if all the trustees are abroad (*k*), or if in a case where a receiver would have been appointed against one trustee were he the sole trustee, the other trustees consent (*l*).

Injunction.] In all the above cases an injunc-

(*y*) Murray v. Lord Elibank, 10 Ves. 84.
(*z*) Osborn v. Morgan, 9 Hare, 434. See note to Ord. XVII., r. 8, App. pt. I.
(*a*) Executors admitting they had lent a part of the assets on a promissory note ordered to pay in the amount. Vigrais v. Binfield, 3 Mad. 62, and see Wiglesworth v. Wiglesworth, 16 Beav. 272.
(*b*) Richardson v. Bank of England, 4 My. & Cr. 165; Rothwell v. Rothwell, 2 Sim. & Stu. 217.
(*c*) Middleton v. Dodswell, 13 Ves. 266.
(*d*) Everett v. Prythergch, 12 Sim. 367.
(*e*) Bainbrigge v. Blair, 10 L. J. Ch. N. S. 193.
(*f*) Langley v. Hawk, 5 Mad. 46.
(*g*) Scott v. Becher, 4 Pri. 346.
(*h*) Hathornthwaite v. Russell, 2 Atk. 126. See also Taylor v. Allen, 2 Atk. 213.
(*k*) Smith v. Smith, 10 Hare, App. 81.
(*l*) Tidd v. Lister, 5 Mad. 429.

tion may be obtained to prevent the trustee or other persons from meddling with the fund or estate, if the circumstances require it. And it should be remembered that an injunction can be obtained much more expeditiously than a receiver. But if time is of importance in the obtaining a receiver, a proper person may be named in the notice of motion.

Evidence at hearing.] As to this, see *ante* (*l*). No special remarks on the subject are necessary in this place.

Suit simply to execute trusts.

Decree at hearing.] In cases of trusts arising upon a written instrument, or founded upon parol declarations, the decree will in cases of doubt be prefaced with a declaration to the effect that by the acts in question a trust was validly constituted, and that the same ought to be carried out under the direction of the Court. Where there is any difficulty of construction, the Court will proceed to declare the true effect of an instrument. This frequently necessitates a class inquiry, which will accordingly be directed. Then any other special inquiries or directions will be inserted. An account will in general be directed of the trust estate and income come to the hands of the trustees, not, however, unless a special case has been made by the plaint with wilful default or rests. After inquiries have been directed, further consideration is in general reserved. In a simple case it is sometimes possible to work out all the equities in the original decree, by making it prospective as to the result of accounts or inquiries. In this case the decree provides for the costs.

Decree where defendants have taken trust property with notice.

Where the defendants are charged by reason of their taking trust property with notice of the trust, the decree will be commenced by declaring this fact, and that they therefore hold the property subject to the trusts. The decree will then provide for their having a lien for improvements &c., if the Court considers them so entitled, and

(*l*) Page 32.

will also, if possible, declare their rights over as against the fraudulent trustees. Accounts will be directed as in the previous case.

If the defendants are made liable for a breach of trust, it will be declared that they, or, if any of them are representatives of the defaulting trustees, their testators, are jointly and severally liable to the extent of the breach, and an inquiry will be directed as to its amount; and if assets are not admitted by the representatives of a deceased trustee, his estate must be administered. Of course if the administration of his estate, it being more than 500*l.* is beyond the jurisdiction of the Court, this relief cannot be obtained (*m*) in the County Court. The equities between the defendants will also if possible be adjusted.

Suit to repair breach of trust.

So also, in a case of constructive trust, there will be a declaration constituting the party a trustee, and an account will be directed upon the footing applicable to the particular case (*n*).

A person declared a trustee of renewed leaseholds is entitled, on assigning them to the *cestui que trust*, not only to be repaid with interest for expenses of renewal and lasting improvements, even those made pending the suit, but also to be indemnified against the covenants in the lease, and he has a lien for the balance due to him on taking the accounts, and till a proper indemnity is delivered to him (*o*). The indemnity may be settled by the Judge in case the parties differ (*p*).

Decree where defendant declared trustee of renewed lease.

But such trustee will it seems be liable for wilful default (*q*).

Wilful default.

Where a settlement contained a covenant to settle future acquired property, new trustees were held not liable for wilful default for omitting to inquire whether the old trustees had

(*m*) See *supra*, Part I., p. 47.
(*n*) See Seton, p. 748, *et seq.*
(*o*) Giddings v. Giddings, 3 Russ. 241.
(*p*) See Ord. VI., r. 1, and Form 23.
(*q*) Adams v. Sworder, 3 N. R. 623.

received, but misappropriated, monies payable under the covenant, nor in respect of sums received by the covenantor after their appointment, there being no circumstances of suspicion to put them on inquiry (*t*).

Interest—rests.] A trustee is chargeable with interest, if he retain balances idle in his hands longer than the exigencies of the estate were at all likely to require; *à fortiori* if he has applied them to his own use. The rules on this subject are laid down with great clearness by Lord Romilly in *Jones* v. *Foxall* (*u*), in the following words:—"Generally, it may be stated, that if an executor" (and the rule of course applies equally to a trustee), "has retained balances in his hand which he ought to have invested, the Court will charge him with simple interest at 4 per cent. on these balances; if in addition to such retention he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment, in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum; if in addition to this he has employed the money so obtained by him in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest." In the last mentioned case the *cestui que trust* has the option, which the Court exercises for him if he is an infant. And indeed in every case the *cestui que trust* may demand the entire profit made from the fund; the trustee must account for every farthing he has actually received (*v*). And a trustee who is a trader will be considered to employ the money in trade if he merely put it

Trustee retaining balances charged with 4 per cent. simple interest;

in case of breach of trust with 5 per cent.;

investing money in trade, &c., with profits or with compound interest at 5 per cent.

Trustee trader paying trust monies to his general account.

(*t*) *Ex parte* Geaves, 4 D. M. & G. 291.
(*u*) 15 Beav. 392.
(*v*) Forbes v. Ross, 2 Cox, 116.

to his general account at his banker's, since it thus adds to his credit (*w*). A trustee employing trust funds in two separate adventures, losing on the one and gaining on the other more than 5 per cent., will be compelled to account for the profits on the one adventure, and to pay the capital with 5 per cent. interest on the other. Where a trustee is bound by the express terms of his trust to accumulate a given fund, he will be charged with compound interest, if he merely retain it in his hands (*x*).

Trustee bound to accumulate.

The rules above given are general, not universal, rules, and under special circumstances the Court has relaxed them (*y*).

The Court seldom charges interest upon funds which have never come to the hands of the trustee (*z*). But this does not apply to a debtor to the estate who colludes with the trustee in defrauding it (*a*).

Funds never come to hand.

Just allowances.] A trustee will be allowed all monies which he has actually and properly paid (*b*). Thus he will be allowed travelling expenses (*c*), fees to counsel and solicitors, the costs incurred in a suit on behalf of the trust estate, and he will not be tied down to the amount of his costs as taxed between party and party (*d*), and he will have a lien upon the estate if a balance is due to him in respect of such expense (*e*). Nor will he be deprived of a right to such expenses because he has a legacy as a reward for his *trouble* (*f*), or because he has not kept proper accounts, if he can prove indisputably that he has advanced out of his own pocket such a sum at

(*w*) Moons v. De Bernales, 1 Russ. 301.
(*x*) Raphael v. Boehm, 11 Ves. 107.
(*y*) See Jones v. Foxall (*loc. cit.*)
(*z*) Tebbs v. Carpenter, 1 Mad. 290.
(*a*) See Rolfe v. Gregory, 5 N. R. 258.
(*b*) Worrall v. Harford, 8 Ves. 8.
(*c*) *Ex parte* Lovegrove, 3 Dea. & Chit. 763.
(*d*) Ramsden v. Langley, 2 Vern. 536; and see Johnson v. Telford, 3 Russ. 477.
(*e*) *Ex parte* Chippendale, 4 De G. M. & G. 19.
(*f*) Wilkinson v. Wilkinson, 2 Sim. & Stu. 237.

least (*g*). And where he incurs expenses for the benefit of and with the sanction and approbation of his *cestuis que trustent*, they are collaterally bound to recoup him, if the expenses are proper, and absolutely if they are not such as the trust estate ought to bear (*h*). Trustees in general refuse to hand over the trust fund until the *cestuis que trustent* have at their own expense executed a release under seal. But this in general cannot be insisted upon (*k*).

Cestuis que trustent must indemnify trustee against expenses incurred at their request.

So also trustees may employ, at a salary or commission, collectors (*l*), bailiffs (*m*), and accountants if the affairs are complicated (*n*), and they will be allowed expenses reasonably and properly incurred in these ways.

Collectors, accountants, &c.

But, in the absence of an express contract or an express provision, a trustee cannot claim any remuneration for his own personal services, even if he be a solicitor and act professionally on behalf of the trust (*o*). And a contract for such remuneration between trustees and *cestuis que trustent*, or a provision in the settlement, is strictly construed. And therefore if a solicitor be entitled to charge for professional services, he cannot charge for services not strictly professional, as for attendances on transfers of stock, paying debts, &c. (*p*). But a trustee who has not yet acted may stipulate with the Court for any remuneration that the Court chooses to give him (*q*). It is not, however, the practice of the Court to allow such remuneration otherwise than by a fixed salary (*r*).

Trustee not entitled to anything for his trouble.

Trustee solicitor.

(*g*) Hethersell v. Hales, 2 Ch. Rep. 158.

(*h*) Balsh v. Hyham, 2 P. Wms. 453. *Ex parte* Chippendale, 4 De G. M. & G. 19; see p. 54.

(*k*) See *ante*, p. 125.

(*l*) Davis v. Dendy, 3 Mad. 170; Stewart v. Hoare, 2 Bro. C. C. 663.

(*m*) Chambers v. Goldwin, 9 Ves. 272.

(*n*) New v. Jones, 9 Jarm. Prec. 338; Henderson v. McIver, 3 Mad. 275.

(*o*) New v. Jones (*loc. cit.*); Todd v. Wilson, 9 Beav. 486.

(*p*) Harbin v. Darby (No. 1), 28 Beav. 325.

(*q*) Newport v. Bury, 23 Beav. 30; Brocksopp v. Barnes, 5 Madd. 90.

(*r*) Bainbrigge v. Blair, 8 Beav. 588; see p. 595.

The above rules do not apply strictly to a person who is fixed with a constructive trust. Thus a trader, who was held a trustee in respect of money employed by him in his trade, was allowed a reasonable compensation for his trouble in managing the business (*s*). But it is otherwise if an express trustee so apply the money (*t*). Constructive trustee may be allowed for his trouble.

Further consideration.] It is not often the case in a suit for the execution of trusts, that the further consideration brings to light difficulties of construction and other complicated questions, such as generally arise on the further consideration of administration suits. In truth, as we have already observed, an administration suit on further consideration is often under the same conditions as a suit for execution of trusts is at the hearing. See *ante*, p. 102, *ad fin.* Occasionally it happens on the original hearing of a suit for the execution of trusts that inquiries are directed as to persons or classes having an actual or possible right in the estate or fund, and that new parties are added after decree by supplemental proceedings. Where this is done, questions of construction, or other points which in general are discussed at the hearing, will not be disposed of till further consideration.

Costs.] In considering the question of costs, it is material to distinguish between the cases in which the trustee admits the trust and those in which he sets up an adverse claim. And first as to the cases in which the trustee admits the trust.

As a general rule, trustees are entitled to their costs, charges, and expenses out of the estate, but the application of the rule depends upon the conduct of trustees and their strict observance of the duties of their trust (*u*). And the rule applies equally whether the trustee is plaintiff or defendant. Trustees in general entitled to their costs, charges and expenses out of the estate.

But trustees will not be allowed their costs, and may even have to pay them where their conduct Exceptions.

(*s*) Brown v. De Tastet, Jac. 284.
(*t*) Stocken v. Dawson, 6 Beav. 371.
(*u*) Beer v. Tapp, 31 L. J. Ch. 513.

Suit to repair breach of trust.

is improper. Thus, if the sole object of the suit be to repair a breach of trust, the trustee will have to pay the costs of the suit (*v*). And even if it has turned out beneficial to the estate, the *cestuis que trustent* are entitled to make the trustee bear the costs of an inquiry as to this fact (*w*), unless the benefit was clear. And *à fortiori* will he be required to pay costs if he has before or during the suit been guilty of misrepresentation, whether it consist in *suggestio falsi*, as by making false statements in evidence or in the plaint or statement, falsifying accounts (*x*), setting up a false pretence of outstanding debts as a reason for retaining balances in hand (*y*), &c., or in *suppressio veri*, as by concealing material evidence in his possession (*z*). So also if his behaviour has been in any other way fraudulent, as if being a trustee for sale he refused an advantageous offer, because the purchaser would not concede him a personal benefit (*a*), or even employed a person to purchase for him on a sale of the trust property by auction (*b*). And in cases of misfeasance the Court does not seem to have been diligent to apportion the costs in favour of the trustee, where some part of them was due to other causes than his misbehaviour, but generally, in case of difficulty or apprehended expense in apportioning, to have thrown the whole on him (*c*). However, if the costs are easily distinguishable, as where a defendant ordered by the decree to repair a breach of trust does so promptly, and the decree is prosecuted for other purposes, he will not have to bear the costs of proceedings not connected with

Inquiry as to breach of trust.

Trustee guilty of fraud.

Apportionment of costs in cases of breach of trust.

(*v*) Caffrey v. Darby, 6 Ves. 488; Byrne v. Norcott, 13 Beav. 336.

(*w*) Solicitor General v. Corporation of Bath, 18 L. J. N. S. Ch. 275.

(*x*) Mallabar v. Mallabar, Ca. t. Talbot, 71; Shepherd v. Smith, 2 Bro. P. C. 372.

(*y*) Crackelt v. Bethune, 1 Jac. & W. 586.

(*z*) Borough of Hertford v. Poor of Hertford, 2 Bro. P. C. 377.

(*a*) Hide v. Haywood, 2 Atk. 126.

(*b*) Sanderson v. Walker, 13 Ves. 601.

(*c*) See Shepherd v. Smith, 2 Bro. P. C. 377; Hide v. Haywood, 2 Atk. 126; Reech v. Kennegal, 1 Ves. 123.

ne breach of trust (*d*). And if the breach of rust is trifling and has occasioned no loss, the rustees may be allowed their full costs (*e*).

Trustee not deprived of his costs for mere negligence.

Mere nonfeasance not wilful, such as forbearng to invest trust monies in hand, though in eneral a ground for charging the trustee with nterest, is not sufficient to deprive him of his osts (*f*). But this is not the case if a trustee, vhether through carelessness or for any other ause, mis-state his accounts (*g*).

Costs where trustee occasions suit.

If a suit is rendered necessary by the vexatious, unreasonable, or over cautious conduct of a trusee, he must bear the costs of it. This rule aplies where a trustee pertinaceously refuses to render accounts or give information to the *cestui que trust* or his solicitor (*h*), though even in this case, on fairly accounting, he will get the costs subsequent to the hearing (*k*). So also, if in a case where the law is clear he refuses to transfer the fund to a person absolutely entitled (*l*), or requires an unreasonable cogency of evidence as to a matter of fact, *e.g.*, a death (*m*), or the pedigree of an heir-at-law or next of kin (*n*), or attempts to impose unreasonable conditions on the *cestui que trust*, such as the execution of a release in the case of a trust created by an unsealed instrument (*o*).

Trustee retiring.

We have seen that a person who has accepted the office of trustee can in general retire only upon paying the costs of a suit necessary to re-

(*d*) Hewett v. Foster, 7 Beav. 348.
(*e*) Royds v. Royds, 14 Beav. 54.
(*f*) Travers v. Thompson, 1 Moll. 496; Fozier v. Andrews, Jo. & Lat. 199.
(*g*) Shepherd v. Smith, 2 Bro. P. C. 372; Reech v. Kennegal, 1 Ves. 123.
(*h*) Kemp v. Burn, 1 N. R. 237; Eglin v. Sanderson, 8 Jur. 329.
(*k*) Boynton v. Richardson, 31 Beav. 340.
(*l*) Harvey v. Harvey, 3 Jur. 919.
(*m*) Lyse v. Kingdon, 1 Col. 184.
(*n*) Lancashire v. Lancashire, 1 De G. & Sm. 288.
(*o*) See Re Carter's Trusts (No. 1), 25 Beav. 361; Fulton v. Gilmour, Hill on Trustees, 605; In Re Heming's Trust, 3 K. & J. 46, the trustee was merely disallowed his costs, but this was on petition under the Trustee Relief Act.

lieve him (*p*), except circumstances have altered and the execution of the trust has greatly increased in difficulty since he undertook it, as if he has become old and feeble, and unable to attend to business (*q*). And in such case as that last mentioned he is not bound to pay in money under the Trustees Relief Act (*r*). On the other hand, if a trustee has clearly become disqualified, and refuse to retire where it was possible for him to do so, as the trustee of a meeting-house who has changed his religion, he will have to pay the costs of a suit to remove him (*s*).

Trustee refusing to retire.

Trustees are bound not unnecessarily to burden the trust estate by their mode of conducting their case. If, therefore, they sever in their defences, one set of costs only is in general allowed (*t*), except there are special circumstances to justify such a course, as where one trustee is a party to the suit in another character as well as that of trustee, and opposed to it (*u*). Unless it is clear at the hearing which of the parties is in the wrong, when the allowed costs will be directed to be paid to the others, the division of the one set of costs allowed is left to the taxing master, *i. e.*, registrar (*v*). But where one trustee is fixed by the decree with a breach of trust, the innocent trustees also made defendants are entitled to their costs, either out of the fund or from the plaintiff, who has them over against the guilty party (*w*).

Trustees severing.

So also trustees, where they institute a suit, ought to join as co-plaintiffs, and one who wantonly refuses to join, and is therefore made a defendant, will not be allowed his costs (*x*).

(*p*) Forshaw v. Higginson, 20 Beav. 485.
(*q*) Gardiner v. Downes, 22 Beav. 395.
(*r*) Barker v. Peile, 5 N. R. 425.
(*s*) Attorney General v. Murdock, 2 K. & J. 561.
(*t*) Hodson v. Cash, 1 Jur. N. S. 86; Webb v. Webb, 10 Sim. 55.
(*u*) Gaunt v. Taylor, 2 Beav. 346.
(*v*) Course v. Humphrey, 26 Beav. 402.
(*w*) Bagot v. Bagot, 10 L. J. Ch. N. S. 116; See Seton, p. 93.
(*x*) Hughes v. Key, 20 Beav. 397; Collier v. Dudley, 2 L. J. Ch. 15.

A trustee is entitled to be indemnified out of all xpenses out of the trust fund or estate, and he as a lien thereon for the amount of such ex- enses; but persons employed by him have no ight as creditors against the trust fund (*y*). The mployment of a solicitor on business relating to he trust estate by the authority of the trustee, ives the solicitor no lien or charge upon the trust state (*z*). The trustee is entitled not only to his osts of suit as between solicitor and client, but lso to the costs, charges, and expenses properly ncurred by him out of Court. If he has retained hem out of the fund he will be allowed them in aking the account as just allowances, which are o be made without express direction (*a*). If he as not retained them, and the fund is in Court, hey must be taxed by the registrar. It may be desirable in some cases that an inquiry as to extra osts should be inserted in the decree or order (*b*).

Trustee has a lien for his costs, charges and expenses, but not his solicitor, &c.

Inquiry as extra costs.

A person who, being nominated a trustee, re- fuses to accept the office and disclaims in Court, is only entitled to his costs as between party and party (*c*). He should disclaim at the earliest pos- sible stage of the suit. (See *ante*, p. 42.) But it is enough if he disclaims when bill filed against him (*d*). A person who agreed to execute a deed of disclaimer upon an undertaking that his costs and expenses should be paid, was, in *Re Tryon* (*e*), held entitled to the expense of taking counsel's opinion as to his obligation to execute the deed.

Costs of disclaiming trustee.

Persons upon whom the trust estate is cast by act of law are entitled to their full costs out of the fund, as an executor of a last surviving trus- tee of stock (*f*), and *a fortiori* an heir-at-law.

Executor, &c. of deceased trustee.

As to a person assuming to act as trustee with- out authority, it is conceived that if the suit be so

Costs of quasi trustee.

(*y*) Worrall v. Harford, 8 Ves. 4.
(*z*) Hall v. Laver, 1 Ha. 575.
(*a*) Ord. VI., r. 13.
(*b*) Seton, 767.
(*c*) Bulkeley v. Earl of Eglinton, 1 Jur. N. S. 994.
(*d*) Bellamy v. Brickenden, 4 K. & J. 670.
(*e*) 7 Beav. 496.
(*f*) Legg v. Mackrell, 2 De G. F. & J. 551, n.

framed as to adopt his acts, and seek relief against him on the footing of his being an actual trustee, he will be in the same position as to costs as if he were a trustee *de jure;* but that if the suit charge him as a stranger wrongfully intermeddling, he will in general have to pay costs.

Where trustee sets up adverse claim.

A trustee setting up a claim adverse to the trust, as, for instance, where he claims property as his own, which in truth belongs to another, on the ground of a resulting trust, as in the case of a purchase in the name of the plaintiff, must, if he fails, in general pay costs (*g*). But a relaxation of this rule would probably be made if the transaction was, through the acts of the plaintiff himself, or those under whom he claimed, ambiguous and obscure. The general rule also applies where the defendant is fixed with a constructive trust.

Apportionment of costs.

If the adverse claim in which the trustee fails extends only to a partial interest in the fund, and was *bonâ fide* advanced, the Court will generally apportion the costs, and make the trustees pay only so much as has been occasioned by their wrongful claim (*h*). On account, however, of the difficulty and expense of apportionment, the Court is not disposed to make refined distinctions (*i*), and will sometimes cut the knot by giving no costs on either side (*k*). In the case just referred to it would not seem to be just, if but a small part of the expense of the suit is due to the trustee's erroneous claim, to deny him the bulk of his costs, which have been incurred solely by reason of his undertaking the trust, and in such a case the Court would probably give him his entire costs.

Court not disposed to make nice distinctions.

(*g*) See Bruin v. Knott, 12 Jur. 616,
(*h*) See Bruin v. Knott (*loc. cit.*)
(*i*) Knott v. Cottee, 16 Beav. 81.
(*k*) Jones v. Farrell, 1 De G. & J. 208.

CHAPTER III.

FORECLOSURE AND REDEMPTION.

Jurisdiction, &c. . . . 139
Introduction 140
The several kinds of Mortgages, Charges and Liens . . 142
Legal Mortgage . . . 142
Equitable Mortgage . . 142
Charges 145
Vendor's Lien . . . 146
Vendee's Lien . . . 147
Other Liens . . . 147
Plaint 148
Parties 149
Defences.
to Foreclosure *Suit between original Mortgagor and Mortgagee* 159
to Redemption *Suit between original Mortgagor and Mortgagee* . . . 160
Defences—continued
peculiar to Persons claiming under the Mortgagor 162
peculiar to persons claiming under the Mortgagee . 164
Evidence at Hearing . . 166
Decree at Hearing . . . 167
Tacking and Consolidation . 175
Proceedings under Decree.
Accounts 179
Costs, Charges, and Expenses 182
Costs of Suit . . . 183
Costs occasioned by loss of Title Deeds and of Reconveyance . . . 184
Enlarging Time before Final Decree 184
Final Decree 185
Receiver 186

Jurisdiction, &c.] The County Courts held by virtue of an Act passed in the 9th and 10th years of the reign of Her Majesty, chapter 95, shall have and exercise all the power and authority of the High Court of Chancery in the suits or matters hereinafter mentioned (that is to say) . . . . . .

3. In all suits for foreclosure or redemption or for enforcing any charge or lien where the mortgage, charge, or lien shall not exceed in amount the sum of five hundred pounds.

Sect. 10.] With respect to the Court in which proceedings in equity shall be taken,

1. Proceedings under this Act which relate to

the *recovery or sale* of any mortgage, charge or lien on *lands, tenements, or hereditaments*, shall be taken in that County Court within the district of which the lands, tenements, or hereditaments or any part thereof are situate (*a*).

Forum.

By r. 6, the Court within the district of which some one of the defendants resides or carries on business will be the proper *forum* if the mortgage &c. do not affect lands, tenements, or hereditaments, and perhaps even in that case if an equitable mortgagee by agreement seek to have a legal mortgage executed.

By sect. 11, causes may in certain cases be transferred from one Court to another.

The mode of proceeding is by plaint (Order I., r. 1.)

INTRODUCTION.

Nature and origin of the jurisdiction.

The jurisdiction in these cases is one which will perhaps be more extensively had resort to than any other branch, from the limit being not the value of the property charged but the value of the charge.

Mortgages in fee or for a term.

The jurisdiction of equity in mortgages arose first at the instance of the mortgagor. The mortgagee's estate is either absolute at law in the first instance with a proviso for redemption in the form of an agreement for reconveyance, or absolute at law on the non-compliance with the proviso for redemption which is in the form of a condition destroying the estate. The first is the mortgage in fee and the second the mortgage for a term of years.

In the first instance the agreement for reconveyance could only be enforced by a Court of Equity under its jurisdiction for compelling specific performance of agreements; in the second, and also in the earlier form of mortgages in fee with a proviso destroying the estate, under its jurisdiction for carrying out the true object of all parties, namely, a pledge for a loan.

(*a*) See *supra*, p. 4, note.

Equity having thus interfered in the case of mortgages at the suit of the mortgagor to control and modify the legal estate of the mortgagee, gave a power to the mortgagee by a proceeding on his part to limit the period in which the mortgagor might redeem the property.

Thus the mortgagor's suit for redemption gave rise to the mortgagee's suit for foreclosure.

Equitable mortgages.

Besides legal mortgages there are mortgages which exist only in Courts of Equity; as an agreement to make a legal mortgage, which constitutes an equitable mortgage.

Mortgages of an equity.

Again, the owner of an equitable interest in property, as the *cestui que trust* of a trustee who has a legal estate, may pledge this by a mortgage of his equity; so that in addition to equitable mortgages, there are mortgages of an equity.

Courts of Equity deal with these two classes of mortgages on principles partly derived from their doctrines as to specific performance, which are applicable to equitable mortgages, and partly derived from their doctrines as to the execution of trusts, which are applicable to mortgages of an equity.

Charges.

Besides this there are charges of sums of money upon property which are not agreements for a legal mortgage, but are simply agreements that the money shall be paid out of the property, and which the Court enforces at the instance of the owner of the charge by sale.

Remedy sale.

Liens.

Lastly, there are liens, giving an interest in property until satisfaction of some claim (*aa*); in some of these equity interferes at the cost of the owner of the lien; in all at the instance of the owner of the property subject to the lien to compel the lien to be given up on satisfaction of the claim.

Jurisdiction of equity in cases of lien.

Before entering on the practice of Courts of Equity in suits relating to these various descriptions of incumbrance, it will be desirable to take a short view of their nature and incidents.

(*aa*) See Gurnell v. Gardner, 4 Giff. 626.

OF THE SEVERAL KINDS OF MORTGAGES, CHARGES, AND LIENS.

Legal mortgage.] In general the nature of a legal mortgage will appear on the face of the deed. Extrinsic evidence, parol or written, is, however, admissible to shew that a conveyance absolute on its face was in fact made by way of mortgage (*b*). Where the instrument is ambiguous it is useful to consider whether the grantee takes the usual rights and remedies of a mortgagee or of a purchaser, *e. g.*, whether the covenants for title are absolute or restricted (*c*). It is important to ascertain also at whose expense the deed was prepared and executed, a vendor not paying the expense of the purchase deed, as a mortgagor does that of the mortgage deed (*d*); and the Court will be unwilling to hold a transaction a mortgage and not a sale, after a considerable lapse of time, as for instance thirty years (*e*).

Extrinsic evidence admissible,

but not after long time.

Equitable mortgage.] A contract to mortgage may be treated as an agreement for a legal mortgage, and may enable the contractee to sue for specific performance and obtain a legal mortgage (*f*); or provided it relate to a definite or ascertainable subject, and the money has been actually advanced, is in equity equivalent to a mortgage, and enables the contractee to foreclose and have a conveyance of the legal estate. If it affect real estate, it must, by the Statute of Frauds, be evidenced by writing, signed by the mortgagor or his agent (*g*); except in cases where Courts of Equity have considered an act done equivalent to writing.

Of lands must in general be in writing.

Equitable mortgage by deposit.] A deposit of all or a material part of the title deeds of an estate or other similar evidences of property, *e.g.*, a

(*b*) Wynne v. Styan, 2 Ph. 303.
(*c*) Goodman v. Grierson, 2 Ba. & Be. 274.
(*d*) Williams v. Owen, 10 Sim. 386; 5 My. & C. 303.
(*e*) Goodman v. Grierson, (*loc. cit.*)
(*f*) Jones v. Greatwood, Seton on Dec. 443; Sporle v. Whayman, 20 Beav. 607.
(*g*) 29 Car. 2, c. 3, s. 4.

bill of lading, or certificate of title under the Land Transfer Act (*g g*), with intent to create a security, is evidence of an agreement to mortgage the property; and even in the case of real estate this is considered sufficient without writing, notwithstanding the Statute of Frauds (*h*). The mere fact of a deposit made at the time of an advance in the absence of any special relation between the parties raises a presumption of an intent to give a security, although not a word passed (*k*). But in the case of a pre-existing debt some additional evidence must be given (*l*).

Evidence that deposit by way of mortgage.

Parol or contemporary written evidence may be given of the nature and extent of the security, *e. g.*, whether it was to cover future advances. And where future advances were not originally contemplated, slight evidence will be sufficient to prove that a subsequent advance was made on the faith of the security, and such evidence may be parol (*m*).

Further advances.

The deeds may be placed in the hands of a trustee on behalf of one or more creditors, but it seems such trustee must not himself be a creditor (*n*). For cases where the possession of the mortgagor or his agent has been attributed to the mortgagee, see *Ferris* v. *Mullens*, 2 Sm. & Giff. 378, 18 Jur. 718; *Ex parte Hirtzel*, 3 De G. & J. 464.

With whom deposit may be made

It seems that the delivery of title deeds to enable a legal mortgage to be prepared for a then existing debt, creates an immediate equitable mortgage (*o*).

Delivery of deeds to prepare legal mortgage.

Judgments.] By the 1 & 2 Vict. c. 110, s. 13, a judgment operates as a charge upon any interest in real estate, which the judgment debtor has power to dispose of for his own benefit, in the

1 & 2 Vict. c. 110, s. 13.

(*gg*) 25 & 26 Vict. c. 53, s. 73.
(*h*) Russel v. Russel, 1 Bro. C. C. 269; S. C. 1 Wh. & Tu. L. C. 541.
(*k*) *Ex parte* Mountfort, 14 Ves. 606.
(*l*) Chapman v. Chapman, 13 Beav. 308.
(*m*) *Ex parte* Whitbread, 19 Ves. 209; *Ex parte* Kensington, 2 Ves. & B. 79.
(*n*) *Ex parte* Whitbread (*loc. cit.*)
(*o*) Keys v. Williams, 3 Y. & C. Ex. C. 55; Hockley v. Bantock, 1 Russ. 144.

same manner as if the debtor had by writing under his hand agreed to charge the same with the amount of the judgment debt and interest thereon. But it is provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up the judgment.

Sect. 18.

By the 18th section, decrees and orders in equity, lunacy, or bankruptcy, and rules of courts of common law, directing the payment of money, are made equivalent to judgments. But an order of the Court of Probate is not a judgment within the Act (*p*). The charge given by the 13th section extends only to such interest as the debtor could *honestly* charge, and therefore will not defeat a prior voluntary conveyance (*q*). It does not extend to the profits of an ecclesiastical benefice, involving cure of souls (*r*), and it is doubtful whether it affects land vested in a municipal corporation (*s*).

Order of Court of Probate.

To what property judgment charge extends.

Remedy foreclosure.

It seems that the proper remedy of a judgment creditor is foreclosure (*t*).

Registration.

The effect of the charge was subject to various provisions in favour of *bonâ fide* purchasers, mortgagees, &c., under which it was necessary, in order to obtain the full benefit of the enactment, to register the judgment every five years. The 23 & 24 Vict. c. 38 rendered it necessary to issue and register a writ of execution. Ultimately, the 27 & 28 Vict. c. 112 was passed, under which (s. 1) no judgment entered up after the 29th of July, 1864, affects any land, until such land has been actually delivered in execution, by virtue of a writ of *elegit* or other lawful authority. The 2nd section requires such writs to be registered in the *debtor's* name. The Act also provides (s. 4) that every creditor to whom any land of the debtor has

27 & 28 Vict. c. 112.

Sect. 2.

Sect. 4.

(*p*) Pratt v. Bull, 1 De G. J. & Sm. 141.
(*q*) Beavan v. Earl of Oxford, 6 D. M. & G. 492.
(*r*) Hawkins v. Gathercole, 7 D. M. & G. 1.
(*s*) See Arnold v. Mayor, &c. of Gravesend, 2 K. & J. 574.
(*t*) See Jones v. Bailey, 17 Beav. 582; Messer v. Boyle, 21 Beav. 559; Ford v. Wastell, 6 Ha. 229; 2 Ph. 591; Seton (3rd edit.), 461.

been actually delivered in execution, and whose writ is duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery upon petition in a summary way an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made, as to the nature and particulars of the debtor's interest in such land and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed so far as the same may be found conveniently applicable.

Sect. 5.

Sect. 5 provides for serving other judgment &c. creditors having a charge on the property, and for the distribution of the proceeds of the sale among the various incumbrancers according to their priorities.

Mode of proceeding under 27 & 28 Vict. c. 112.

It is apprehended that where the judgment is for a less sum than 500*l.* the judgment creditor may proceed in the County Court by petition, notwithstanding Order 1, r. 1, that being the remedy expressly given by the statute.

Equity of redemption.

It seems that the statute does not apply to an equity of redemption (*u*).

Accounts, &c., must be prayed for.

The accounts and inquiries referred to in sect. 4 must be specifically prayed for (*v*).

Charges.] A mere charge upon property may be created by any agreement which, if it affect land, must be in writing. It is in general created by a will or settlement, in which case it is often secured by legal powers, as a power of distress and entry, or by a trust term. Equity does not in general interfere in favour of the owner of a

(*u*) Thornton v. Finch, 4 Giff. 515.
(*v*) *Ex parte* Clarke, 6 N. R. 335. For form of order, see Fleming's Case, 13 L. T. 793.

Arrears of annuity.

legal rent charge; but where the payments are considerably in arrear, it will, in a case where it appears necessary in order to give effect to the rights of the annuitant, order a sale of the inheritance, and this even where a term is vested in trustees to secure due payment of the charge.

Vendor's lien.] A vendor has in general a lien upon the property sold for the unpaid purchase-money, whether the sum remaining unpaid is now due or is not payable till a future day, and whether it is a sum in gross or payable by instalments (*w*). But such lien may be waived or abandoned. It is not waived by the vendor merely taking a note or bond or even real security for the amount, but it is waived, if it appear that the transaction was in fact a sale in consideration of the security (*x*). So that the question is to a great extent one of intention to be decided by the circumstances of each case. Thus, if the contract be in consideration of a peculiar benefit with a separate security (*y*), the fulfilment of which necessarily extends over an uncertain period, as where an estate is sold in consideration of an annuity for lives to be secured by a bond, it will require strong evidence to shew that the purchaser was intended to take the property subject to the lien. So, also, taking a mortgage for part of the purchase-money is strong evidence of an intention to waive the lien as to the remainder (*z*). And it has been said, that taking distinct security, as a mortgage on another estate, or a bond with sureties, *primâ facie* discharges the lien (*a*). And this inference seems stronger where such distinct security is given some time after the sale, as if Blackacre be sold, and afterwards a mortgage of Whiteacre be made to the vendor to secure the unpaid purchase-money, especially if Whiteacre be an ample security. Neither the receipt clause in the conveyance, nor the indorsed receipt, concludes

May be waived.

Waived by taking independent security.

Parol evidence admissible.

(*w*) Mackreth v. Symmons, 15 Ves. 328; Collins v. Collins, 31 Beav. 346.

(*x*) Dixon v. Gayfere, 1 De G. & Jo. 655; 21 Beav. 118.

(*y*) Dixon v. Gayfere (*loc. cit.*)

(*z*) Bond v. Kent, 2 Vern. 281.

(*a*) Cood v. Pollard, 9 Price, 544; 10 Price, 109.

the vendor (*b*); but the purchaser may by parol evidence show the real nature of the transaction.

Vendee's lien.] In every case between vendor and purchaser there is an implied contract that the purchaser shall, in the event of the purchase going off, have a lien on the vendor's interest in the property for what he pays under the contract (*c*). So, also, a contractee for a lease who has laid out money under an express agreement that it shall be repaid in case the contractor cannot grant a valid lease (*d*). Contractee for lease.

Liens in general.] Liens in general arise either by operation of law or by the usage of some particular business, and are appropriately discussed in treatises on the special branches of law to which they relate. It will, therefore, be sufficient here to mention, that a solicitor has a lien for his costs upon property recovered in an action or suit by his exertions, that, where a purchase is set aside, the purchaser has a lien for the amount of the purchase-money and interest ordered to be repaid, and for all such sums as are allowed him for improvements, &c.; and on a similar principle a person declared a trustee of a renewed leasehold has a lien for the expenses attending the renewal. There is also a lien arising from what in the civil law is called *versio in rem*, which happens when a person advances money by which property is saved from destruction, as money advanced to render a ship seaworthy, or to prevent a policy of assurance from being forfeited for non-payment of premiums. In general also a *bonâ fide* possessor of land, who is ejected by a person claiming under a paramount equitable title, has a lien for repairs and lasting improvements. Solicitor. Purchase of reversion, &c., set aside Renewed lease. *Versio in rem.* Bonà fide possessor.

These equitable liens must, however, not be confounded with the lien or right of retainer available at law. The latter is a mere right of possession, and is discharged by yielding up pos- Distinction between liens at law and in equity.

(*b*) Winter v. Lord Anson, 1 Sim. & Stu. 445; 3 Russ. 488.
(*c*) Wythes v. Lee, 3 Dr. 396; Rose v. Watson, 10 H. L. 672, see *post*, p. 255.
(*d*) Middleton v. Magnay, 2 Hem. & M. 233, and see Hipkins v. Amery, 2 Giff. 292.

session. Under some circumstances, it authorizes the holder of the property to sell, but it is doubtful whether the Court will ever interfere to assist him (*e*). The former are not lost by delivery up of possession, and in all cases confer a right to have the property sold by the decree of a Court of Equity.

Bill of Sales Act.

A mortgage of personal chattels, in order to be valid against subsequent creditors, must be registered under the Bills of Sales Act, 17 & 18 Vict. c. 36, and even then the property may pass to assignees in bankruptcy, under the order and disposition clauses. (See *post*, p. 163.)

Ships.

Mortgages of ships are governed by the Merchant Shipping Acts (*f*).

SUITS FOR FORECLOSURE AND REDEMPTION.

Plaint.

Where there has been no change in the person of the mortgagee or mortgagor, the plaint will be by the mortgagee against the mortgagor, or *vice versâ*.

The forms of plaint in an ordinary case are given in No. 6.

If any special circumstances exist as a ground for special relief other than that ordinarily given, they must be stated.

If the mortgagee has been in possession, the plaint to redeem should state this fact, and in such case it may be well to allege also, that the defendant, or those under whom he claims, if he is not the original mortgagee, have been in actual occupation of the estate, or some part thereof, and to ask that he may be charged with an occupation rent. Of course, a plaint to redeem cannot be filed before the time for redemption is passed, as the mortgagee might then, on payment reconvey if the mortgage was in fee, or by payment of the money the term might cease if the mortgage was for a term.

(*e*) See The Thames Iron Works Company v. The Patent Derrick Company, 1 J. & H. 93.

(*f*) See 17 & 18 Vict. c. 104.

It is desirable to allege in a bill to foreclose, that the mortgagor has in his possession some title-deeds belonging to the estate, and to pray that on foreclosure he may be ordered to deliver them over to the mortgagee.

Plaint of equitable mortgagee.

If the plaint seeks to realise an equitable security, or to enforce a charge or lien, it should state precisely the facts which are relied upon affording ground for the relief asked. And where conversations are relied upon as evidence, their effect should be stated; but the details, if lengthy, should be left to come out in evidence (*ff*).

Pleading conversations.

Alternative prayer.

The power of framing the prayer in the alternative, asking *e. g.* for foreclosure, or in the alternative for a sale, is sometimes useful.

No power of discovering other incumbrances.

The practitioner must remember that there is no power of compelling the defendant before the hearing to disclose the existence of other incumbrances. He may simply remain silent, or may merely admit the plaint, but the mortgagee cannot get a denial upon oath of there being any incumbrancers not parties to the suit. If the existence of such incumbrancers comes out in the course of the proceedings, it would seem that the plaintiff will be compelled to file a new plaint, as a decree in the old one will be practically valueless unless leave to amend is given at the hearing. It is possible, that an inquiry may be directed as to other incumbrances, and that they may be allowed to be brought before the Court by a supplemental plaint, for they cannot be served under 15 & 16 Vict. c. 86, s. 42.

Whether inquiry as to incumbrances will be granted.

Married woman.

A plaint to redeem a mortgage on the real estate of a married woman should not be filed by the husband and wife merely, but by the wife by her next friend, making her husband a co-plaintiff. And this is the right course, even where the husband is a bankrupt (*g*).

PARTIES TO THE SUIT.

Co-mortgagors or co-mortgagees.] As against

Co-mortgagors.

(*ff*) See *supra*, p. 13.

(*g*) Smith v. Etches, 1 H. & M. 558. As to foreclosure, see Lewis v. Poole, 2 Giff. 636.

the mortgagee any one of several joint tenants or tenants in common of the equity of redemption may redeem (*h*), but the remaining joint tenants or tenants in common should be defendants, in order that there may be one account binding on all parties, and the estate may not be eaten up by the expenses of several accounts (*k*).

One of several co-mortgagors abroad.

A foreclosure decree cannot be made in the absence abroad of a co-owner of the equity of redemption, even where the equity is vested in a trustee, on trust to sell and divide the produce among the co-owners, notwithstanding the 15 & 16 Vict. c. 86, s. 42, r. 2 (*l*).

Co-mortgagees

All the co-owners of the money must be parties to a foreclosure, or redemption suit (*m*); they ought, in the former case, to join as plaintiffs.

Surety for mortgagor.] A surety who merely covenants to pay the debt, is not a necessary party to a suit to foreclose, unless he has paid something, in which case he has a charge on the mortgagee's interest for the amount he has paid (*n*). But if a surety S. mortgage his own estate Y. as a collateral security for the debt of his principal P., secured by the mortgage of the estate X. of that principal, S. is entitled to redeem the estate X., and is therefore a necessary party to a suit to foreclose P. (*o*) The decree in such a case will direct, that on payment by P., the mortgagee reconvey X. to P., and Y. to S.; that on payment by S., he convey X. and Y. to S., and that in default of both P. and S. paying the amount due, they be respectively foreclosed (*p*).

Mortgagee v. Mortgagor and owner of estate made a collateral security. Decree.

Mortgage by husband and wife.

A married woman, who concurs with her husband in mortgaging her estate of inheritance to secure the husband's debt, is considered to have

(*h*) Waugh v. Land, G. Coop. 130; Wynne v. Styan, 2 Ph. 306.
(*k*) Palk v. Clinton, 12 Ves. 48; Fell v. Brown, 2 Bro. C. C. 276.
(*l*) Caddick v. Cook, 32 Beav. 70.
(*m*) Vickers v. Cowell, 1 Beav. 529.
(*n*) Gedye v. Matson, 25 Beav. 310.
(*o*) Stokes v. Clendon, 3 Sw. 150 n.
(*p*) Seton, p. 417.

concurred as a surety only (*q*). And such a mortgage is presumed to be for the husband's benefit, though the presumption may be rebutted by parol evidence, provided it be not inconsistent with the language of the instruments effecting the transaction (*r*). The rule under consideration does not extend to a case where the mortgage is effected by the exercise of a joint power of appointment reserved to the husband and wife (*s*).

Mortgage by married woman of her separate estate.

If a married woman mortgage her separate estate to secure a certain sum and further advances to herself or her husband, a further advance made to the husband alone will, without any further act of the woman, be a charge on the estate (*t*).

ASSIGNMENTS OF THE MORTGAGEE'S INTEREST.

Legal estate.

The legal estate in the mortgaged premises, where in the mortgagee, is governed as to its transfer and devolution by the ordinary rules affecting real property.

Right to the money advanced.

But the right to receive the mortgage money is regarded as the principal thing, the legal estate in the mortgaged property being merely the accessory, so that he in whose hands it is holds it for the benefit of the person entitled to the money, except he be a *bonâ fide* purchaser without actual or constructive notice. This right is personal estate, and on the mortgagee's death devolves upon his executor or administrator.

Transfer of mortgage.

Where the mortgagee assigns the debt and conveys the legal estate in the mortgaged property to the assignee, he is not a necessary or proper party to a suit to foreclose or redeem, and the assignee, or the last assignee if there be several,

(*q*) Huntingdon v. Huntingdon, 2 Vern. 437; 4 Bro. P. C. 1.
(*r*) Clinton v. Hooper, 1 Ves. Jr. 173; 3 Bro., C. C. 212, 213; Earl of Kinnoul v. Money, 3 Swanst. 202 n.; Hudson v. Carmichael, Kay, 613.
(*s*) Scholefield v. Lockwood, 3 N. R. 177; 32 Beav. 434.
(*t*) Greenough v. Shorrock, 4 N. R. 40; reversing S. C. 3 N. R. 599.

is the only proper plaintiff or defendant (*u*). An equitable assignment of the debt need not, however, be in any particular form, so that it may happen that the legal estate remained in the original mortgagee. In such a case, the holder of the legal estate should be a party, but if the assignee be plaintiff, he ought either to procure a conveyance to himself before filing his plaint, or to make the holder of the legal estate a co-plaintiff. But it seems that the costs of making him a defendant will not fall on the assignee, unless the mortgagor prove his willingness to have been made a co-plaintiff (*v*). The same rule holds where the legal estate was either originally, or at the time of a transfer, intentionally vested in a trustee. Where the original mortgagee never had the legal estate, as in the case of a mortgage of an equity of redemption, he is in no case a proper party to the suit.

Costs of making holder of legal estate defendant.

Where the mortgagor is not a party to the assignment, the assignee takes subject to the state of accounts between the mortgagor and mortgagee (*w*), unless the mortgagor is by his previous conduct, or subsequent ratification, estopped from disputing the correctness of the representation made to the assignee. If, therefore, the mortgagee or any *mesne* assignee has been in possession, his receipts, as also his acts and defaults, are imputable to the last assignee, but he is not therefore a proper party either to a suit to foreclose or to redeem.

Assignee of mortgage takes subject to account between assignor and mortgagor, unless the latter concur.

Costs of transfer of mortgage.] If the interest is regularly paid, and the mortgagor is not called on to pay the principal, the costs of a transfer made without his concurrence will not be allowed to the mortgagee (*x*).

If the mortgagee settle the money due on the mortgage, it was formerly necessary to bring before the Court all the persons interested in the mortgage money (*y*). But now, having regard

Settlement of the mortgage money.

(*u*) Chambers v. Goldwin, 9 Ves. 268; Daniel, 250.
(*v*) Brown v. Lockhart, 10 Sim. 420.
(*w*) Chambers v. Goldwin, 9 Ves. 269, 270.
(*x*) Re Radcliffe, 22 Beav. 201. (*y*) Daniel (4th edit.), 249.

to the enactment contained in 15 & 16 Vict. c. 86, s. 42, r. 9, it will be the safer course in all ordinary cases to make the trustees alone parties. The Court will exercise the discretion conferred upon it by this section in cases where it seems requisite, in order to secure the due application of the money, that the *cestuis que trustent*, or a competent number of them, should be present—*e. g.*, if the original number of trustees is considerably reduced, or if only the representatives of the last survivor are parties (*z*).

Costs of parties rendered necessary by mortgagee's settlement of the money.] The costs of parties thus properly made defendants are payable by the substantial plaintiff, who, if mortgagee, adds them to his security.

Sub-mortgagees.] If there are sub-mortgages, all the derivative mortgagees must be brought before the Court, so that the mortgagee's interest may be completely represented (*a*), and each of them is entitled to add his costs to his security, including those which he pays to his immediate mortgagee, and the original mortgagee adds to his security the aggregate of such costs. Costs of sub-mortgagees.

The original mortgagor need not be a party to a foreclosure or redemption suit between the original mortgagee and his derivative (*b*).

Donatio mortis causa.] Delivery of the mortgage deed will constitute a good *donatio mortis causa*, and upon the death of the donor the heir or devisee will be a trustee for the donee (*c*). The title of the donee is complete on the death of the donor and the assent of the executor is not required (*d*).

Death of the mortgagee.] On the death of the mortgagee, the right to the mortgage money, except a *donatio mortis causa* intervenes, devolves on the executor or administrator, who therefore Right to the money generally devolves on

(*z*) See Stansfield v. Hobson, 16 Beav. 189. (The marginal note does not agree with the report.)
(*a*) Hobart v. Abbot, 2 P. Wms. 643.
(*b*) Smith v. Chichester, 2 Dr. & W. 393; Seton, 422.
(*c*) Duffield v. Elwes, 1 Bl. N. S. 497, 1 Dow. & C. 1.
(*d*) See Thompson v. Hodgson, 1 Stra. 777.

personal representative.

Specific legatee.

is in all cases the proper plaintiff in a suit to foreclose, or defendant in a suit to redeem. But it is conceived that, if the testator has made a specific bequest of the debt, which is assented to by the executor, the specific legatee ought to be joined as a plaintiff in the former case and as a defendant in the latter.

Devolution of the legal estate.] Where the legal estate is vested in the mortgagee, it passes to his heir or devisee. Difficulties sometimes arise in ill-drawn wills as to whether certain words include estates vested in the testator as mortgagee. Where the mortgage is the subject of a specific bequest, the legatee takes the legal estate, if an intention that he should, is expressed in the will or may be inferred from the general scope and language of the instrument (*e*). But, where this is not the case, a general devise will pass mortgage estates, unless it can be collected from expressions in the will or purposes or objects of the testator that he did not mean that they should pass (*f*). Thus, if the property comprised in the general devise be subject to the payment of debts, legacies, annuities, or any other species of charge, or the will contain limitations or provisions to which it cannot be supposed that the testator intended to subject property not beneficially his own, as uses in strict settlement or executory limitations, a tenancy in common with a clause of accruer (though it is otherwise if there be no such clause), or a trust for sale, or for a charity, or for the separate use of a married woman, the mortgage lands will be presumed not to have been intended to pass. But this presumption ceases if the testator unequivocally, as for instance by express words, declare his intention that they should pass (*e*).

Where legal estate passes by general residuary devise.

Costs of testator's unreasonable disposition of mortgage estates.] The testator's estate will, it is said, have to bear the costs occasioned by a

(*e*) See the cases collected in 1 Jarm. (3rd edit.) 660—3.
(*f*) Lord Braybroke v. Inskip, 8 Ves. 417.

capricious or unreasonable disposition. (See 1 Jarm. on Wills, 663).

Heir or devisee of mortgagee.] The heir or devisee must, where the legal estate was vested in the mortgagee, be a defendant to a foreclosure or redemption suit. In the former he has his costs from the plaintiff, who adds them to his security; in the latter, the decree will order him to convey the estate on receiving his costs. The costs in each case are taxed as between solicitor and client. Costs.

There is now no escheat of a mortgage estate (*g*) and where the heir-at-law cannot be found, a vesting order may be obtained after the money is paid off. No escheat of mortgage estate.

CHANGE IN THE INTEREST OF THE MORTGAGOR.

Devolution of equity of redemption.] In equity the mortgagor is considered as the owner of the property subject to the mortgage, so that the equity of redemption follows the same course of devolution as the legal estate would have followed had it never gone out of the mortgagor. This rule is of course subject to exception, in the case where the equity of redemption is intentionally limited so as to follow a different course. But it is presumed that the object of a mortgage is merely the creation of a security and not the modification of the title to the property (*h*). And a strong indication of intention is necessary to rebut this presumption, as for instance, an express recital of such an intention, or a disposition effected by the instrument of such an elaborate character as cannot be supposed to have arisen from mere ignorance of, or inadvertence to, the prior state of the title (*k*). Equity of redemption limited differently from the estate before the mortgage.

Husband and wife.] The rule impressing the

(*g*) 4 & 5 W. 4, c. 23.
(*h*) Dav. Prec. vol. 2, p. 525; Butler's note to Co. Lit. 208 a.
(*k*) Innes v. Jackson, 16 Ves. 356, reversed on appeal, Jackson v. Innes, 1 Bli. N. S. 104.

transaction with the character of a mortgage only applies with peculiar force in the case where husband and wife concur in a mortgage of the wife's estate, and the equity of redemption is reserved to the husband and his heirs, or otherwise limited so as in terms to transfer it from the wife. In such a case it has been said that "it may well be doubted whether the intention to change the equitable title to her estate, would ever be inferred from the mere language of the proviso for redemption, without aid from other parts of the instrument in whatever terms it were framed" (*l*), but this seems too strongly expressed (*m*).

In reference to mortgages by tenants in tail, the 3 & 4 Wm. 4, c. 74 (The Fines and Recoveries Act), provides (s. 21) that a mortgage in fee effected by deed enrolled shall absolutely bar the entail both in equity and in law, notwithstanding the expression of an intention that the mortgage shall not operate as an absolute bar. But an incumbrance effected by the creation of an estate *pur autre vie* or any less estate, or without the creation of any legal interest at all, is in equity to be a bar so far only as may be necessary for giving effect to the charge, notwithstanding an expressed intention that it should have a larger operation.

Mortgages by tenants in tail. 3 & 4 Wm. 4, c. 74.

Equity of Redemption Settled.] Where the equity of redemption is settled on one for life, with remainders over, either the tenant for life (*n*), or the remainderman may redeem, and all of them down to, and including, the owner of the first estate of inheritance (which is sufficient to bind subsequent remainders), must in general be parties to a suit to foreclose. But in any case the first right to redeem is given to the tenant for life, and in the event of his exercising it, he

Relative rights of tenant for life and remaindermen in foreclosure or redemption suit.

(*l*) Dav. Prec. vol. 2, p. 528; See Fisher, p. 150, Sug. Pow. vol. 1, p. 352, edit. 7.

(*m*) Atkinson v. Smith, 3 De G. & Jo. 186. The rule is confessedly vague and difficult of application in doubtful cases.

(*n*) Wicks v. Scrivens, 1 J. & H. 215; Riley v. Croydon, 2 Dr. & Sm. 293.

cannot compel those in remainder to redeem him. He may, however, where plaintiff, bring the remaindermen before the Court, in order that they may be present at the taking of the account. If he does so, he must pay their costs, and then he will be entitled to a charge on the estate, for the aggregate amount which he has paid to the mortgagee and the remaindermen, and on his death his representatives may file a bill to foreclose. But if a plaint to redeem is filed by the assignee of the tenant for life, and the latter dies before the hearing, the plaint will be dismissed with costs (*o*).

Costs of remaindermen made parties to tenant for life's suit.

Death of tenant for life.

The 9th rule of the 42nd section of 15 & 16 Vict. c. 86 may here again be referred to, rendering it in certain cases unnecessary to make all the beneficiaries parties where the equity of redemption is vested in trustees. In *Marriott* v. *Kirkham* (*p*) it was allowed to be resorted to, in which case it was held that the surviving trustee and executrix of the mortgagor, who was also tenant for life of the mortgaged property, sufficiently represented the remaindermen in a suit to foreclose. In doubtful cases it is suggested, that it will be better to abide the direction of the Court, given under the last clause of the rule.

15 & 16 Vict. c. 86, s. 42, r. 9.

It will be remembered that women married since 31st December, 1833, are dowable out of an equity of redemption (*q*), and they therefore have a right of redemption in like manner as a tenant for life. The same rule applies to tenants by curtesy or for other particular estate, and persons having legacies or other sums charged on the equity of redemption.

Dowress may redeem.

Tenants by curtesy, legatees, &c.

There is no escheat or forfeiture of an equity of redemption. But if the mortgage is created by carving a term out of the inheritance, leaving the legal remainder in fee in the mortgagor, and this escheat, it has been held, that the legal reversion attracts the benefit of the term, as being of the nature of an attendant term, subject to

Escheat of equity of redemption.

(*o*) Riley v. Croydon, (*loc. cit.*)
(*p*) 3 Gif. 536.
(*q*) 3 & 4 W. 4, c. 105.

the mortgage, and that therefore the lord may redeem (*r*).

Equity of redemption charged or incumbered.] Where the equity of redemption is charged or incumbered, an incumbrancer seeking to foreclose must make all incumbrancers subsequent to himself, down to, and including, the mortgagor parties to the suit, but he is not obliged to redeem prior incumbrancers; he may do so, if he pleases, and bring them before the Court offering to redeem them.

Assignees in bankruptcy.] The equity of redemption of a bankrupt passes to his assignees, who are therefore entitled to redeem. As to their costs in cases where they disclaim, see *ante*, p. 42.

Bankruptcy annulled.

As to the right to sue of a bankrupt whose bankruptcy has been annulled, see *Adams* v. *Sworder*, 2 De G. Jo. & Sm. 44, and of an insolvent under the old law, all whose debts have been vaid, see *Troup* v. *Ricardo*, 5 N. R. 62.

Old insolvancy.

Death of the mortgagor.] Before the 17 & 18 Vict. c. 113, commonly called Locke King's Act, the personal estate of a deceased mortgagor (*s*) was the primary fund for the payment of the mortgage debt, unless it were the debt of a predecessor, and had not been adopted by the succeeding owner; but by that Act, the heir or devisee of a person dying after 31st December, 1854, must bear the burden, unless the testator by his will, or other document, has expressed a different intention. Under the old law, the mortgagor's personal representative was not, except under peculiar circumstances, a necessary or proper party to a suit to foreclose or redeem (*t*). Since the Act, he appears to stand in the same position as a surety for the heir or devisee, and, therefore, it would seem that unless he has paid something, he is not a proper party; but that if he has paid anything, he is. See *ante*, p. 150. But if the

(*r*) Viscount Downe v. Morris, 3 Ha. 394.

(*s*) Bagot v. Bagot, 5 N. R. 157; see Duncombe v. Hansley, 3 P. Wms. 333 n.

(*t*) Bradshaw v. Outram, 13 Ves. 234; see Faulkner v. Daniel, 3 Ha. 213.

mortgagee ask for a sale, and for payment of any deficiency out of the general estate of the deceased, the executor was, and is still, a necessary party (*u*).

DEFENCES TO A SUIT TO FORECLOSE BETWEEN ORIGINAL MORTGAGOR AND MORTGAGEE.

Release, payment, tender.] The mortgagee's plaint will fail, if the debt has become extinguished by release or payment, or by settlement in account. Where a day is named for payment of the principal, the mortgagee cannot be compelled to accept payment before that day, and after it he is entitled to six months' notice before being paid off, or to six months' interest in lieu of notice. A tender improperly refused by the mortgagee, if pleaded, will stop the running of interest, and cause him to be charged with the costs of the suit. A defence of this kind must be pleaded.

Mortgagee entitled to six months notice before being paid off.

Tender.

Defence must be pleaded.

Statute of Limitations.] The right to file a bill to foreclose is not affected by the 6th section of the 3 & 4 Wm. 4, c. 27, but falls within the 24th section of that Act, as explained by the 7 Wm. 4 & 1 Vict. c. 28 (*v*). The first of these provides that no person claiming any land or rent in equity shall bring any suit to recover the same, but within twenty years next after the right to sue shall have first accrued.

Right to file bill or suit to foreclose when barred.

It was, however, considered doubtful, upon the wording of this Act, whether the right to sue was not to be deemed to have first accrued to a mortgagee upon the day named in the proviso for redemption, and the 1 Vict. c. 28, was therefore passed, which enacted that any person claiming under any mortgage of land, may bring a suit to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage.

(*u*) Daniel, (4th edit.) p. 273.
(*v*) Wrixon v. Vize, 3 Dru. & War. 104.

An allowance of ten years is made for persons under disability and their representatives from the termination of the disability, or from death, so, however, that no action or suit be, under any circumstances, brought after the expiration of forty years.

Time once begun to run not suspended.

It should be borne in mind, that if time once begins to run, the running is not suspended by reason of any subsequent disability.

A defendant intending to rely on the Statute of Limitations, should raise it by his statement in the nature of an answer, or he may, it is conceived, merely give the notice required by 9 & 10 Vict. c. 95, s. 76.

Decree in former suit.] A decree made in a former suit between the same parties or those under whom they claim, and relating to the same subject-matter will bar the mortgagee's right. But a prior mortgagee is not bound to go in under a decree obtained by a subsequent incumbrancer, but may file a bill of his own (*w*). A decree of a foreign Court of competent jurisdiction is also a bar unless it was obtained by fraud, or proceed upon a wilful disregard of the amity of nations (*x*). And a judgment *in rem* is conclusive against all the world.

Decree of foreign Court.

Mortgage void or voidable on ground of fraud.] A case of this nature cannot, according to the practice of the Court of Chancery, be set up by the answer, but the defendant relying upon it must file a cross bill. Such cross bill does not come within the jurisdiction given by the Act.

DEFENCES TO A SUIT TO REDEEM BETWEEN ORIGINAL MORTGAGOR AND MORTGAGEE.

Release or sale of equity of redemption by mortgagor.] A release or conveyance of the equity of redemption by deed will bar the plaintiff, but it may be shown in answer that it was made on terms, in fact giving the plaintiff a new right to

(*w*) Arnold v. Bainbrigge, 2 De G. F. & J. 92.
(*x*) Simpson v. Fogo, 1 J. & H. 18; 1 H. & M. 195.

redeem, and as no amendment is possible without leave, this statement in the nature of a replication should be contained in the original plaint, and may be there introduced by a statement that the defendant pretends the plaintiff is barred by the release. A sale of the equity of redemption to the mortgagee, subject to a right of re-purchase within a limited time, will be upheld, if such were the clear intention of the parties (*y*).

Sale of equity of redemption to mortgagee subject to right of re-purchase.

Decree in former suit.] This, even though the plaintiff were *coverte* (*z*) at the time, will bar a plaint to redeem under the same limitations as those which apply to a plaint to foreclose, as to which see *ante*, p. 160. A mortgagee is entitled to pursue all his remedies at law or equity at the same time. But if, after a final foreclosure decree, he sue the mortgagor at law, he opens the foreclosure and the mortgagor is entitled to redeem notwithstanding the decree.

Mortgagee entitled to pursue all his remedies at once.

Foreclosure opened by mortgagee suing at law after final decree.

Statute of Limitations.] The 3 & 4 Wm. 4, c. 27, s. 28, provides that, when a mortgagee has taken possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem, but within twenty years next after the time at which the mortgagee took possession, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him, in which case the suit may be brought within twenty years next after the last of such acknowledgments. An acknowledgment to one of several co-mortgagors or his agent enures for the benefit of all; but the acknowledgment of one of several co-mortgagees only enables the mortgagor to redeem the interest of the party making the acknowledgment on

Where mortgagee enters, mortgagor barred after 20 years, unless acknowledgment.

Acknowledgment to co-mortgagor, or by one of several co-mortgagees.

(*y*) Gossip v. Wright, 2 N. R. 152.
(*z*) Mallack v. Galton, 3 P. Wms. 352 n.

payment of a proportional part of the whole debt. As already observed, the statute should be pleaded or notice given of intention to set it up, (*ante*, p. 160.) Time does not begin to run against the mortgagor before the day appointed for redemption, nor so long as he retains possession of any part of the estate (*a*).

When time begins to run.

The acknowledgment need not be in any particular form, and it may be made more than twenty years after the mortgagee took possession. An expression referring to the estate as mortgaged, or importing a readiness to settle the account, or referring to a proposed arrangement for accounting or paying off, will be sufficient, but the words used must be unequivocal.

Acknowledgment must be unequivocal.

Disability of mortgagor.

It is doubtful whether the disability clause (s. 16) of the 3 & 4 Wm. 4, c. 27, applies to the mortgagor, his heirs, &c. (See Sug. R. P. S. p. 114; Fisher, p. 95.)

Statute does not apply to chattels.

The statute does not apply to chattels, and the mortgagor it seems may redeem them at any time during his life.

All the defences above mentioned must be pleaded, and the 9 & 10 Vict. s. 97, s. 76, *ante*, p. 21, must be borne in mind. As to a defence founded on the doctrine of tacking or of consolidation, see *post*, pp. 175, 178.

DEFENCES PECULIAR TO PERSONS CLAIMING UNDER THE MORTGAGOR.

There are but few of these that deserve special notice.

Lease under power.] A lease granted by the mortgagor after the mortgage is in general invalid as against the mortgagee. There is an exception if the lease be good at law and the lessee had no notice of the mortgagee's equity. And the mortgagee may by his conduct estop himself from disputing the mortgagor's power to grant a lease. Where the deed contains a power authorizing the mortgagor to lease, he may

Power to lease in mortgage deed.

(*a*) Fisher, 88.

make a lease to a trustee for himself at a fair ent, and on reasonable terms (*b*).

Property in the order and disposition of the mortgagor.] If the property the subject of the mortgage be personal property, and be left in the apparent ownership of the mortgagor, the Court of Bankruptcy has power, under the 12 & 13 Vict. c. 106, s. 135, to order it to be sold for the benefit of the creditors. It may be observed, that notice to the debtor or his recognised agent is necessary to take debts and other *choses in action* out of the order and disposition of the immediate creditor, and that where the fund is in Court a stop order is requisite. A person who purchases property sold under the circumstances above mentioned will hold it free from the mortgagor's claims.

Notice of assignment of choses in action should be given to debtor.

Stop order.

Mortgage concealed through mortgagee's laches.] If the mortgagee, even though he has obtained the legal estate, be guilty of negligence or heedlessness so gross as that he puts it into the mortgagor's power to commit a fraud, and deal with the estate as absolute owner; as for instance, if he make no inquiry for the title deeds, and leave them in the mortgagor's hands, and *a fortiori* if he leave them there for the very purpose of enabling the mortgagor to raise money, or sell part of the estate, a *bonâ fide* sale or mortgage effected by the mortgagor to a person ignorant of the fraud, will be binding as against the mortgagee (*c*). But if the title deeds be inquired for, and an apparently reasonable excuse be given for their absence (*d*), or if some be retained by the mortgagor under circumstances which shew no supine confidence on the part of the mortgagee (*e*), the latter will not be affected by the subsequent dealing with the property. If the mortgage be equitable, or of

Leaving title deeds in hands of mortgagor.

(*b*) Beavan v. Habgood, 1 J. & H. 222.
(*c*) Perry Herrick v. Attwood, 25 Beav. 205, 2 De G. & Jo. 21.
(*d*) See Hunt v. Elmes, 2 De G. F. & Jo. 578; Dowle v. Saunders, 2 H. & M. 242.
(*e*) Espin v. Pemberton, 4 Dr. 333, 3 De G. & Jo. 547; Hunt v. Elmes (*loc. cit.*)

Protection afforded by getting in legal estate.

an equity, the subsequent purchaser or mortgagee without notice, and who has obtained the legal estate, will be protected against the prior incumbrance. But it is to be observed that in all cases where a subsequent purchaser or incumbrancer obtains an advantage over a prior purchaser or incumbrancer by the conveyance of the legal estate, the holder of the legal estate must not have committed any breach of duty in so conveying, and therefore if such holder be a mere dry trustee, as a satisfied mortgagee is, he must be without notice of the prior equity (*f*). This point is recurred to, *post*, p. 176.

DEFENCES PECULIAR TO PERSONS CLAIMING UNDER THE MORTGAGEE.

Purchase without notice.] According to the ordinary rule in equity a *bonâ fide* purchaser from the mortgagee, without notice actual or constructive of the mortgagor's equity will, if he obtains the legal estate, hold it discharged from the equity of the mortgagor or of those claiming under him.

Purchase under power of sale.] It is now usual to insert in mortgages a power of sale, authorizing the mortgagee to sell under certain conditions as to notice and otherwise, but protecting the purchaser from any obligation to inquire whether these conditions have been fulfilled, and making the sale valid as between the purchaser and the mortgagor notwithstanding any impropriety or irregularity; and by the 23 & 24 Vict. c. 145, a power of this nature is made an incident of every mortgage made since 28th August, 1860.

Statutory power of sale.

A defence founded on a *bonâ fide* exercise of a power of sale is regarded with great favour (*g*), but a purchaser who purchases with an actual knowledge of circumstances sufficient as against the

(*f*) Carter v. Carter, 3 K. & J. 617.
(*g*) Matthie v. Edwards, 11 Jur. 761

mortgagee to invalidate the sale becomes a party o the transaction and is not protected by the roviso that a purchaser need make no inquiry (*h*).

Power to sell by auction.

A power to sell by public auction or private ontract does not oblige the mortgagee to make n attempt to sell by auction before he sells by rivate contract, and if there be no provision as o the mode of sale a mortgagee may sell either y public auction or by private contract for an dequate price (*k*). Part of the purchase-money nay be allowed to remain on mortgage from the urchaser, but in that case the mortgagee is hargeable with the total amount as between imself and the mortgagor (*l*). Where a power has been improperly and oppressively exercised, nd such exercise is imputable to the purchaser, t seems that no lapse of time will bar the right o redeem. Accordingly, where the mortgagee had himself become the purchaser, and there were circumstances of oppression in the case, a decree for redemption was made after the lapse of fifteen years, and the mortgagee had to pay the costs up to the hearing (*m*). There is, indeed, no case in which the mortgagee, or his agent, who has acted in surveying the property and receiving the interest, can properly purchase (*n*).

Allowing purchase-money to remain on mortgage.

Power improperly exercised.

Lapse of time.

Depreciatory conditions of sale.

The mortgagee may properly insert in the conditions of sale such stipulations as a prudent vendor selling his own property might insert, though they may be, in a sense, depreciatory, *e.g.*, a condition enabling the vendor to rescind, in case he should be unable *or unwilling* to answer any requisition (*o*), but he ought not to insert stipulations which are unusual and of unnecessary stringency. There is nothing to prevent a second

Second mortgagee may purchase upon sale by first

(*h*) Jenkins v. Jones, 2 Gif. 99; Parkinson v. Hanbury, 1 Dr. & Sm. 144.

(*k*) Davey v. Durrant, 1 De G. & J. 535; Sug. V. & P. p. 56 (3rd edit.)

(*l*) Davey v. Durrant, 1 De G. & J. 535.

(*m*) Robertson v. Norris, 1 Gif. 421.

(*n*) Dart. V. & P. 22.

(*o*) Falkner v. The Equitable Reversionary Society, 4 Dr. 352. 4 Jur. N. S. 1214, S. C.

under power.

mortgagee from purchasing upon a sale by the first mortgagee under his power (*p*).

Notice of intention to sell cannot be given (*q*) pending a suit to foreclose or redeem, but where due notice has been given, the sale can only be stopped by tender of principal and interest and costs, or where the costs are unascertained, and the security clearly sufficient to cover them, by a tender of principal and interest only (*r*).

Sale stopped by tender.

A mortgagee of stock, or of personal chattels, has an inherent power of sale after notice.

Tacking and consolidation.] As to the cases in which a person claiming under the mortgagee is entitled to tack a debt of his own to the mortgage, or to consolidate, see *post*, p. 175.

EVIDENCE AT THE HEARING.

Evidence for plaintiff.] Where no special matter is introduced into the plaint, the evidence necessary to obtain a decree for reference will in most cases be simple.

Proving the deed.

In general the mortgage deed as against persons *sui juris*, though not it is conceived as against persons *non sui juris*, will, unless objected to, prove itself (Ord. III. r. 6), and an affidavit by the plaintiff verifying his plaint, or his testimony to that effect *vivâ voce* at the hearing, be the only other evidence required. Where the evidence is sufficient to entitle the plaintiff to a decree, very slight evidence is necessary to ground special inquiries, *e. g.*, as to money laid out in improvements, &c. (*rr*). But as already observed, the nature of these special claims should be set out by the plaint.

Evidence necessary to ground inquiry.

Evidence for the defendant.] The defendant

(*p*) Shaw v. Bunny, 33 Beav. 494, 5 N. R. 260; Kirkwood v. Thompson, 2 H. & M. 392, 6 N. R. 367.

(*q*) Rhodes v. Buckland, 16 Beav. 212; Paynter v. Carew, 18 Jur. 417.

(*r*) Jenkins v. Jones, 2 Gif. 99; Fisher, 176.

(*rr*) *Supra*, p. 14.

ıust plead in his statement in the nature of an ıswer any special matter which he desires to set p either as negativing the plaintiff's right to a ecree *in toto* or as affording ground for a special irection or inquiry. His own oath will in eneral be sufficient evidence to enable him to btain an inquiry. The 9 & 10 Vict. c. 95, s. 76, ıust be borne in mind in reference to defences f set-off, infancy, coverture, statute of limitations, r discharge under Bankruptcy or Insolvency ıcts. Inquiry.

DECREE AT HEARING.

The form of decretal order made at the hearıg of a foreclosure suit against the mortgagor nly is given in the Schedule, Form 23. It should, owever, be regarded rather as a precedent than s a form to be adopted in every case.

It will be observed that it directs the rents and rofits received by the plaintiff to be taken into ccount. But as we shall see hereafter, *post*, p. 181, mortgagee in possession must account not only or his actual receipts, but also for that which, ut for his wilful neglect and default, he might ave received. Of course the direction will be mitted altogether, if the mortgagee has not taken ossession. Money laid out is not allowed as of ourse. As to this see *post*, p. 182. Rents and profits.

The following is a form of decree for a case, here the account is ordered to be taken with ests. See *post*, p. 181. Decree where rests directed.

"It is ordered that it be referred to the regisrar to take the following accounts:—

"1. An account of what is due to the plaintiff or principal and interest on his mortgage in the laint mentioned, and for his costs of this suit, uch costs to be taxed by the registrar.

"2. An account of the rents and profits of the ereditaments comprised in the said mortgage eceived by the plaintiff, or any other person or ersons by his order or for his use, or which,

without his wilful default, might have been so received. And let what shall appear to be due on such account of rents and profits be applied, first, in discharging the interest, and then in sinking the principal money secured by the said mortgage, and if the same shall break in upon the principal then annual rests are to be made, and interest to be computed on the residue thereof. And the registrar is to certify to the Court the result of such accounts by the —— day of ——. And let, upon the defendant paying into Court what shall be certified to be due for principal, interest and costs as aforesaid within six (calendar) months after the date of the registrar's certificate, the plaintiff re-convey (re-surrender, re-assign) the hereditaments, &c., comprised in the said mortgage free and clear of and from all incumbrances done by him or any persons claiming by, from, or under him, [*If plaintiff be representative of the mortgagee or otherwise claim by derived title, add*, or by those under whom he claims], and deliver up upon oath to the Registrar all deeds and writings in his custody or power relating thereto. But in default of the defendant paying into Court what shall be so certified to be due for such principal, interest and costs as aforesaid by the time aforesaid, the defendant is from thenceforth to stand absolutely debarred and foreclosed of and from all (right, title, interest, and) equity of redemption of, in, and to the said mortgaged hereditaments. Liberty to apply."

The following decree is adapted to the case of a suit brought by the executor of a deceased mortgagee against the mortgagor and the heir-at-law of the mortgagee upon whom the legal estate has descended. See *ante*, pp. 153, 155.

Executor of mortgagee v. mortgagor, and heir-at-law of mortgagee. Decree.

"Let an account be taken of what is due to the plaintiff as personal representative of ——, deceased for principal and interest upon the mortgage in the plaint mentioned and for his costs of this suit, such costs to be taxed by the registrar, and let the costs of the defendant A. (*the heir-at-law*) be taxed as between solicitor

nd client; and upon payment by the defendant . (*the mortgagor*) into Court of what shall be ertified to be due to the plaintiff within six alendar months of the registrar's certificate, nd of the amount of costs due to the de- endant A., let the plaintiff and the said de- endant reconvey the hereditaments, &c., com- rised in the said mortgage free and clear of nd from all incumbrances done by them or either f them, or by the said ——, deceased, or by any ersons claiming by, from, or under them, the laintiff and the said defendant, and the said ——, deceased, or any of them, and deliver up o the registrar upon oath all deeds and writings elating to the said hereditaments, &c. in the ustody or power of them or either of them; and pon such reconveyance being made and the deeds nd writings so delivered up, let the registrar ay out to the plaintiff and the defendant A. espectively, the sums so paid in as aforesaid. But n default of the defendant B. paying into Court vhat shall be certified to be due to the plaintiff or principal and interest, and costs as aforesaid y the time aforesaid, and the amount of costs lue to the defendant A. as aforesaid, the defen- lant B. is thenceforth to stand absolutely debarred nd foreclosed of and from all equity of re- demption in the said mortgaged hereditaments. And in case of such foreclosure, upon payment by he plaintiff to the defendant A. of his said costs, et the defendant A. convey the said mortgaged ereditaments to the plaintiff free from all incum- rances done by him or any person claiming nder him. And any conveyance to be made nder this decree is to be settled by the registrar n case the parties differ."

Heir-at-law of mortgagee an infant,—Trustee Act, 1850.] If in a case similar to the above the defendant the heir-at-law is an infant, the Court can declare that in case of payment by the mortgagor he will be a trustee, within the meaning of the Trustee Act, 1850 (*s*), for the mortgagor, and that

(*s*) 13 & 14 Vict. c. 60, s. 30; and see Bowra v. Wright, 4 De G. & Sm. 265.

in case of non-payment he will be a like trustee for the plaintiff, and thereupon an order vesting the estate or appointing a person to convey can be subsequently obtained (*t*).

Equitable mortgage by deposit. Remedy foreclosure.

Foreclosure is the proper remedy of a legal mortgagee as well as of an equitable mortgagee under an agreement for a mortgage, or as it has been lately decided (*u*) by deposit of title deeds.

Where the defendant consents, or where he is an infant, and the Court judges such a course for his benefit, the foreclosure will be absolute in the first instance. See the Form, Schedule, No. 26.

15 & 16 Vict. c. 86. Sale in foreclosure or redemption

The 48th section of the 15 & 16 Vict. c. 86 enacts, that it shall be lawful for the Court, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer or of the mortgagor or any person claiming under them respectively, to direct a sale instead of a foreclosure on such terms as the Court may think fit to direct, and if the Court thinks fit without either previously determining the priorities of incumbrances or giving the usual or any time to redeem. It is, however, provided, that if the request be made by any subsequent incumbrancer or by the mortgagor or by any person claiming under them, the Court shall not direct any sale without the consent of the mortgagee or the persons claiming under him, unless the party making the request deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on him.

Where ordered.

Even before this enactment the mortgagee of an advowson or of a reversionary interest was entitled to a decree for sale or foreclosure at his option. Under this Act, however, the power of the Court is discretionary, and it will not, except in a special case, be exercised where the mort-

(*t*) 13 & 14 Vict. c. 60, ss. 7—20.

(*u*) Samble v. Wilson, 5 N R. 395; but see Seton, 448 (3rd edit.); 17 Beav. 582 n. Tuckley v. Thompson, 1 Jo. & H. 126.

gagor dissents. If the defendant be an infant the sale must appear to be for his benefit. Defendant an infant.

The deposit must be sufficient to meet on a rough estimate, the possible expenses of an abortive attempt to sell, and a reserved bidding will be fixed sufficient to cover the sum found due to the mortgagee. The conduct of the sale, even although asked for by the second mortgagee, will in general be given to the first (*v*). Deposit. Reserved bidding.

For the form of a decree for sale at the instance of the mortgagee, &c., see the schedule, No. 24.

Where the sale is ordered at the mortgagor's instance, the following form may be adopted :— Sale at mortgagor's instance.

"Let an account be taken of what is due to the plaintiff on his mortgage, and for costs of suit (including the costs of taking the accounts, but excluding the costs of the sale, if any, hereby directed). And let on the defendants C. and L., &c., or any of them, paying the sum of £—— to the registrar to the credit of this cause, within one week after the date of the registrar's certificate of the result of the said account, to be dealt with as this Court shall direct, the hereditaments comprised in the plaintiff's mortgage be sold, with the approbation of the registrar. And let the money to arise by such sale be paid to the registrar to the credit of this cause, to the end that the same may be applied, in the first place, in satisfying what shall appear to be due to the plaintiff as aforesaid. But in case the said sum of £—— shall not be so paid into Court by the time aforesaid, or in case the same shall be so paid, but the said mortgaged hereditaments (or a sufficient part thereof to raise what shall appear to be due to the plaintiff as aforesaid) shall not have been sold within four (calendar) months from the date of the said certificate, then let, upon the defendants paying to the registrar what shall be certified to be due to the plaintiff for such principal, interest and costs, or so much thereof as shall remain due after the application

(*v*) See Morg. Ch. Acts and Orders, p. 204.

of the money arising by such sale as aforesaid, within six calendar months from the date of the said registrar's certificate, the plaintiff reconvey the said mortgaged hereditaments (or such part thereof as may not have been sold) free and clear, &c., and deliver up all deeds, &c. But in default, &c., defendants to be foreclosed. Liberty to apply as to the £ —— if paid in, and otherwise as advised. And in case of a sale, adjourn F. C. (and of the costs attending any such sale or not hereinbefore provided for).

Decree for sale to raise charge.

A decretal order made in a case where no deposit is required, as in the case of a charge or lien, is given in the Form No. 24.

Mortgagee v. mortgagor, and surety.

For the outline of a decree of foreclosure made against the mortgagor and a defendant who has made his estate a collateral security, see *ante*, p. 150.

Sub-mortgages. Decrees.

For decrees in the cases of Derivative mortgagee v. original mortgagee and original mortgagor, and in the case of Mortgagor v. transferee of mortgage and his derivative, see Seton, pp. 421, 473. But in *Lysaght* v. *Westmacott*, 3 N. R. 599, the latter form was objected to, and the Master of the Rolls directed a re-conveyance on the plaintiff, the mortgagee, paying into Court what should be found due from him for principal, interest, and costs, leaving the defendants to settle their rights between themselves.

EQUITY OF REDEMPTION MORTGAGED OR OTHERWISE INCUMBERED.

If the mortgagor incumbers, the successive incumbrances in general rank in order of time, but this rule is subject to the exceptions that arise from the doctrines of priority, tacking and consolidation, as to which see *post*, p. 175.

Sketch of decree.

The general principle upon which the decree in a suit to redeem prior, and foreclose subsequent, mortgages is framed will appear from the following sketch.

Let A. B. C. P. X. Y. be successive mortgagees, of whom P. is the plaintiff, and the others with Z. the mortgagor defendants. The decree in the suit P. v. A. will be to the following effect.

An account of what is due to A. for principal, interest, and costs. B. to redeem A. within six months after the certificate, and in default to be foreclosed. If B. redeem, an account of subsequent interest on what he pays A., and of what is due to him on his mortgage for principal, &c., and C. to redeem B. within three months after the second certificate, or be foreclosed. If C. redeem B., P. to repay him what he pays, with subsequent interest, and to pay him what is due on his own mortgage within three months after the third certificate, or his bill to be dismissed with costs.

If C. do not redeem B., P. may redeem B. on repaying him what he paid A., with subsequent interest and costs, and in default his bill is dismissed. If B. do not redeem A., subsequent interest is computed on A.'s mortgage, and C. has the option of redeeming A., and then P. has the option of redeeming C., on repaying him what he paid A.

If P. exercise his option of redeeming, X. will have a right to redeem him on repaying him what he has paid with subsequent interest and costs; if he do not redeem, a like option is given to Y., and if not accepted, is finally offered to Z.; if X. does redeem, Y. and Z. have successively the option of redeeming him on repaying him what he has paid, and if Y. redeem, Z. has a like option as against him.

A period of six months is given to pay off the first mortgagee, and periods of three months reckoned in each case from the date of the registrar's certificate, ascertaining the amount to be paid, are interposed between each of the subsequent foreclosures. What any puisne mortgagee (as B.) pays the prior mortgagee (as A.) for interest or costs becomes, as against the subsequent incumbrancers and the mortgagor, principal.

First mortgagee v. second mortgagee, and mortgagor.

Minutes of a full form of a decree in a case of first mortgagee v. second mortgagee and mortgagor are added. (Seton, 439.)

"1. Account of what is due to the plaintiff for principal and interest on his mortgage in the plaint mentioned, and for his costs of suit to be taxed, &c. And let the registrar, &c. And let, upon the defendant K. (*second mortgagee*) paying into Court, what shall be certified to be due to the plaintiff for principal, interest and costs within six calendar months after, &c., the plaintiff reconvey to the defendant K. the mortgaged hereditaments free and clear, &c., and deliver all deeds and writings, &c. And upon such reconveyance, &c. But in default of the defendant K. paying into Court what shall be certified to be due to the plaintiff for such principal, interest and costs as aforesaid by the time aforesaid, the defendant K. is from thenceforth to stand absolutely debarred and foreclosed, &c.

"2. And in case of such foreclosure, let the plaintiffs' subsequent interest be computed, &c., and let their subsequent costs be taxed. And let the registrar certify the result (if any) of the accounts lastly hereinbefore directed by the —— of ———. And let, upon the defendants, W. F. (mortgagor) paying into Court, what shall be certified to be due to the plaintiff for principal, interest and costs, together with such subsequent interest and costs as aforesaid, within three calendar months after the registrar shall have made his subsequent certificate, the plaintiff reconvey the said mortgaged hereditaments to the defendant W. F., free and clear, &c., and deliver all deeds, &c. And upon such reconveyance, &c. But in default of the defendant W. F. paying into Court what shall be certified to be due to the plaintiff for such principal, interest and costs as aforesaid by the time aforesaid, the said defendant W. F. is from thenceforth to stand absolutely debarred, &c.

3. But in case the defendant K. shall redeem

the plaintiff (*or* the said mortgaged hereditaments), let subsequent interest be computed on what the defendant K. shall have so paid to the plaintiff, and let an account be taken of what is due to the defendant K. for principal and interest on his mortgage in the pleadings mentioned, and for his costs of this suit (*or* cause) to be taxed, &c. And let the registrar certify the result of such account (if taken) within —— months after the defendant K. shall have paid the money into Court as aforesaid. And let, upon the defendant W. F. paying into Court what the defendant K. shall have so paid into Court, together with what shall be certified to be due to the defendant K. in respect of such subsequent interest thereon as aforesaid, and also what shall be certified to be due to him for principal and interest on his said mortgage, and for his costs as aforesaid within three calendar months after, &c., the defendant K. reconvey, &c., to the defendant W. F., or as he shall appoint, and deliver all deeds, &c. And upon such reconveyance, &c. But in default of the defendant W. F. paying into Court what shall be so certified to be due by the time aforesaid, the said defendant W. F. is from thenceforth to stand absolutely debarred, &c. And any conveyance to be made under this decree, shall be settled by the registrar in case the parties differ. Liberty to apply."

Clandestine mortgage of equity of redemption.

By the 4 & 5 Wm. & M. c. 16 it is provided, that a person who mortgages an estate already subject to a mortgage, without giving notice of the prior charge, shall forfeit his equity of redemption, but the Act extends only to bar the mortgagor, and does not affect the rights of puisne mortgagees (*w*).

Tacking.] The general rule as to the priority of incumbrances in equity is, *Qui prior est tempore, potior est jure.* But this rule is subject to a remarkable exception in cases where there are three or more successive mortgages or other

(*w*) See Kennard v. Futvoye, 2 Gif. 81.

incumbrances. In such a case the third or later mortgagee who took his security without notice of the second or other *mesne* incumbrance at the time of advancing his money, may, at any time before decree, even after bill filed, obtain a conveyance of the legal estate from the first mortgagee, and then he will hold the estate as a security for his own debt as well as the debt of the first mortgagee, in preference to the second or other *mesne* incumbrancer. The fact of his having notice at the time of his getting in the legal estate is immaterial, provided that he had no notice at the time he advanced his money (*x*), nor does it make any difference, that the first mortgagee has notice of the second mortgage. And, even where the first mortgagee after such notice made a further advance, the third mortgagee was permitted to hold the estate as a security both for the original debt due to the first mortgagee, and for the further advance, and for his own debt (*y*).

Notice of how far material.

But, as already observed, no such advantage can be gained by getting in the outstanding legal estate from a dry trustee or satisfied mortgagee, who transfers it to the puisne mortgagee, having himself notice of the prior incumbrance: for that is a breach of duty on the part of the trustee (*z*).

Holder of legal estate must be without notice.

On the same principle a first mortgagee who makes further advances without notice of *mesne* incumbrances may tack such further advances, but he cannot do so, if he has notice, even although the mortgage expressly extend to further advances (*a*). And where the mortgage deed does not expressly extend to future advances, a further charge cannot be created without writing (*b*), though, as already observed, if the mortgage is by mere deposit, it is otherwise (*c*). The first mortgagee is also entitled to tack money

Further advances.

(*x*) Bates v. Johnson, Johns. 304.

(*y*) Peacock v. Burt, Coote on Mortgage, pp. 569—572; 4 L. J. N. S, Ch. 33, S. C.

(*z*) See Carter v. Carter, 3 K. & J. 617.

(*a*) Hopkinson v. Rolt, 9 H. of L. 514.

(*b*) *Ex parte* Hooper, 1 Mer. 7.

(*c*) See *supra*, p. 143.

advanced on a judgment (*d*). But, under the old law, a judgment creditor could not by taking a transfer from the first mortgagee tack his judgment to the prejudice of the *mesne* incumbrancer, nor, it seems, can he do so now, since a judgment is a charge only on property which the debtor could *honestly* charge (*e*). It does not seem that a puisne incumbrancer can derive any advantage over a *mesne* incumbrancer from buying in a judgment prior to the latter (*f*). Judgments.

The right to tack depends upon the possession of the legal estate. It seems, however, that, if the legal estate be outstanding, and the puisne mortgagee procure it to be transferred to a trustee for himself, or obtain a declaration of trust from the present holder, or, in the case of a term, get possession of the deed creating it, such acts are equivalent to an actual conveyance (*g*), but this has been disputed (*h*). Where legal estate not actually got in.

In order to tack, the two mortgages must be vested in the same person in the same right (*k*).

As against those claiming under the mortgagor as volunteers, the benefit of tacking is less grudgingly granted. Therefore the mortgagee of leaseholds may tack simple contract debts of a testator as against the executor (*l*), and, as against the heir or devisee, the mortgagee of freeholds may, since 3 & 4 Wm. 4, c. 104, do the same (*m*), and *a fortiori* specialty debts may be so tacked. But in neither case is the tacking valid as against the assignee for value of the executor, heir, or devisee (*n*). It seems that simple contract debts

(*d*) Brace v. Duchess of Marlborough, 2 P. Wms. 494.
(*e*) See Beavan v. Earl of Oxford, 6 D. M. & G. 523.
(*f*) See Fisher, p. 357.
(*g*) Maundrell v Maundrell, 10 Ves. 246; *Ex parte* Knott, 11 Ves. 618; Wilmot v. Pike, 5 Hare, 22.
(*h*) Frere v. Moore, 8 Pri. 475; and see Sharples v. Adams, 33 Beav. 216.
(*k*) Barnett v. Weston, 12 Ves. 130.
(*l*) Coleman v. Winch, 1 P. Wms. 775.
(*m*) Rolfe v. Chester, 20 Beav. 610; 25 L. J. Ch. 244; Thomas v. Thomas, 22 Beav. 341.
(*n*) Coleman v. Winch (loc. cit.)

may be tacked against the heir, even although there is personal estate unadministered(*o*), but they cannot be tacked so as to prejudice creditors by specialty in which the heir is bound (*oo*), unless the mortgagor has by his will made the equity of redemption equitable assets, in which case specialty debts cannot be tacked as against simple contract debts (*p*). And it is conceived, that in no case can one creditor tack as against another creditor having equal rights with himself.

Where the heir comes to redeem twenty years arrears of interest due on covenant may be claimed as against him (*q*), but whether this can be done in a foreclosure suit against him, unless there is an express trust to pay interest, *quære* (*r*).

Where, upon a transfer the original mortgage is not kept on foot, the subsequent mortgagees are let in in priority to the transferee (*s*).

Consolidation.] A person coming to redeem a security cannot do so without redeeming any other security which the same mortgagee holds upon property of his, whether the securities are held by the same person or on trust for the same person (*t*). And the mortgagee of estate A. may take a transfer of a mortgage upon estate B., and then unite the two mortgages, even against a puisne mortgagee of estate B., of whose security he had notice before the transfer (*u*). And his right to total redemption overrides even the right of a surety for the mortgagor of estate B. to stand in the place of the mortgagee whom he pays off. And this right is of equal force in a suit to fore-

(*o*) The observations of the Master of the Rolls to the contrary, contained in the report of Rolfe v. Chester in the Law Journal, are omitted in Mr Beavan's report, and the point seems to have been urged and disregarded in Thomas v. Thomas, 22 Beav. 341.

(*oo*) See Rolfe v. Chester, 20 Beav. 613.

(*p*) Irby v. Irby, 22 Beav. 219.

(*q*) Elvy v. Norwood, 5 De G. & Sm. 240.

(*r*) Sinclair v. Jackson, 17 Beav. 405.

(*s*) Toulmin v. Steere, 5 Mer. 210; but see Phillips v. Gutteridge, 4 De G. & Jo. 531.

(*t*) Tassell v. Smith, 2 De G. & Jo. 713; Neve v. Pennell, 2 H. & M. 170.

(*u*) Kent v. Padget, 2 De G. & Jo. 611.

close (*v*). But if, before the transfer, the equity of redemption of the two estates has been absolutely vested by sale or gift in two distinct persons, the right of consolidation does not arise (*w*). And the second mortgagee of one estate, as A., may pay off the first mortgagee and take a conveyance of the two estates, and hold them as a security for his own debt and what he paid the first mortgagee against a purchaser of B., at all events, where the purchase was subsequent to the second mortgage of A., and perhaps also, if it were prior (*x*).

This doctrine exists only for the benefit of the mortgagee, so that, if estates X. and Y. are mortgaged to A., then X. becomes vested in B., and Y. in C., B. and C. are *inter se* liable for such proportion of the debt as the values of their respective estates bear the sum of those values (*y*); in other words, if the debt be P.,

B must pay $\frac{X}{X+Y}P$

C must pay $\frac{Y}{X+Y}P$

PROCEEDINGS UNDER THE DECREE.

Account, principal.] Where the mortgage is to secure a floating balance, or future advances, an inquiry will be ordered as to the amount due. Inquiry as to amount of principal due.

Interest.] If no rate of interest be fixed, yet, if it appear from the deed that interest was intended to be made payable, or if the debt be one which in its nature bears interest, as on a covenant to pay on a day certain, 4 per cent. will be allowed. Where no rate reserved, 4 per cent. allowed.

And, since a deposit of title deeds implies an agreement to execute a legal mortgage in the usual form, it would seem that the mortgagee is, even in the absence of any agreement on Whether interest allowed on mortgage by deposit.

(*v*) Farebrother v. Woodhouse, 23 Beav. 18.
(*w*) White v. Hillacre, 3 Y. & C. 597.
(*x*) Titley v. Davies, 2 Y. & C. C. C. 399; Fisher, 382.
(*y*) Gibson v. Seagrim, 20 Beav. 614.

the point, entitled to interest; but this has been doubted, where the debt does not in its nature bear interest (*z*). By the 1 & 2 Vict. c. 110, interest at 4 per cent. accrues on judgment debts.

Interest on judgments.

3 & 4 Wm. 4, c. 27, s. 42.

Interest—Statute of Limitations.] By the 3 & 4 Wm. 4, c. 27, s. 42, since the 31st day of December, 1833, no arrears of interest can be recovered in a suit to foreclose or realise a charge, but within six years next after the same became due, or next after an acknowledgment in writing, signed by the party liable, or his agent, has been given to the person entitled to such arrears or to his agent. It is provided, however, that, where any prior incumbrancer has been in possession within one year next before an action or suit is brought by any subsequent incumbrancer the subsequent incumbrancer may recover the arrears of interest which shall have become due during the whole time that such prior incumbrancer was in possession, although such time may have exceeded the term of six years.

Where more than six years interest recoverable.

Although, by virtue of a bond or covenant, the mortgagee can recover twenty years arrears of interest at law, yet the mortgagor can redeem the land on payment of six years arrears; but, as against his heirs bound by the specialty, more than six years arrears can be recovered in a foreclosure or redemption suit. So, also, even against the mortgagor where there is an express trust to secure the mortgage debt, as by the creation or assignment of a term (see *Shaw* v. *Johnson*, 1 Dr. & S. 412). An acknowledgment made by the mortgagor to the mortgagee will not avail as against a puisne incumbrancer under an instrument anterior to such acknowledgment (*a*).

Provisoes raising or lowering rate of interest.

It is sufficient to mention that a proviso in a mortgage raising the rate of interest in default of punctual payment is void, but a proviso lowering the rate on punctual payment is valid. The distinction is technical and almost absurd.

(*z*) Ashton v. Dalton, 2 Coll. 565.
(*a*) Bolding v. Lane, 1 N. R. 248.

Before the repeal of the Usury Laws, a pro- Capitalization of interest.
pective capitalization of interest in arrear,—by which the mortgagor is, in fact, liable to pay compound interest,—was void; but the better opinion is that it is now valid. Interest accrued due may, and always might, be capitalized.

Mortgagee in possession—Wilful default.] A mortgagee taking possession (as to which an inquiry will be granted if the fact be doubtful) is liable to account not only for all the rents and profits that he has received, but also for wilful default, and he is bound to act as a prudent owner would act; therefore a mortgagee in possession of unfinished houses will be charged with wilful default if, by neglecting to finish them, he cause the premises to be forfeited. The mortgagee will not be allowed anything for his personal trouble in collecting the rents, but he will be allowed the expenses of a bailiff, where the employment of one is reasonable, or where the appointment is according to a provision in the mortgage, or under the power given by 23 & 24 Vict. c. 145. And if he take the estate into his own hands, he will be charged with a fair occupation rent. Inquiry as to possession. Unfinished houses. Allowance for collecting. Occupation rent.

Rests.] If the mortgagee enter into possession without there being any interest in arrear, and the yearly profits imputable to him exceed the yearly interest, a balance will be struck year by year, and the excess of the year's profits over the year's interest applied in reduction of the principal. Where the mortgagee is fully paid, he will, in any case, be charged interest at 4 per cent., with annual rests, on the balances in his hands. A decree, in which rests are directed, is given, *ante*, p. 167.

Improvements &c.] The mortgagee will be allowed money laid out in sustaining or preserving the property. Thus, he will be allowed the expenses of obtaining a renewal of a lease, or of doing what is necessary to protect the mortgagor's title, or of repairing or rebuilding ruinous structures. And this may be done in an improved and more substantial manner than before, so that the work be done providently, and no new or expensive Renewing lease, &c. Repairs.

buildings be erected for purposes different from those of the old buildings. For the mortgagee is not permitted to charge the mortgagor with improvements, which, though they may greatly increase the value and productiveness of the estate, yet are unnecessary for maintaining the property in as good a condition as that in which he found it. Were it otherwise, the mortgagor's right to redeem would be crippled, and he might, in fact, be improved out of his estate. In estimating the value of improvements where there has been rebuilding, it will be ordered that the old buildings be valued as old materials only if they were incapable of repair, otherwise as buildings standing (*b*).

Mortgagee may not be improved out of his estate.

Mode of estimating value of improvements.

An inquiry as to improvements is only directed where there is some evidence to shew that improvements have been made.

Interest on outlay.

Interest on sums properly laid out is in general allowed at the rate reserved on the sum lent, but it is not the practice to give it on money expended in repairs (*c*).

Fire policy.

Premiums on fire policies are, in the absence of a special contract, not allowed (*d*), unless the 23 & 24 Vict. c. 145, s. 11, applies.

Deterioration.] The mortgagee can only be charged with deterioration, whether arising from want of repair, or of proper cultivation, or from any other cause, where there has been gross or wilful negligence, or actual misfeasance (*e*). If he fell timber, or open and work new mines, he will be charged with his receipts and disallowed his expenses (*f*), except where the security is inadequate.

Felling timber or working mines.

Costs, charges, and expenses.] The mortgagee is entitled to add to his security all costs, charges, and expenses properly incurred in supporting or defending the mortgagor's title, or in perfecting his own, whether against the mortgagor, or

(*b*) Robinson v. Ridley, 6 Mad. 2.
(*c*) Seton, 384; Fisher, 498.
(*d*) Bellamy v. Brickenden, 2 J. & H. 137.
(*e*) Seton, 398; Sandon v. Hooper, 6 Beav. 246.
(*f*) Batchelor v. Middleton, 6 Ha. 75.

gainst third persons (*g*). Thus, he will be llowed the costs of a stop order necessary to omplete his security, the fines and fees payable n admission to copyholds, the costs of procuring necessary Act of Parliament, of an ejectment, f an action against the mortgagor's surety, nough the fruits of it be lost by the surety's nsolvency (*h*), as also the costs of defending the ecurity against an action at law, and the mort- agee will not be held down to the amount at hich his costs were taxed at law (*k*); so also ne costs of administering to the mortgagor where ecessary. But such costs must have been easonably and properly incurred, and in general ne costs of an unsuccessful action or suit will not e allowed.

Costs of suit.] The mortgagee is in general ntitled to add the costs of the foreclosure or re- emption suit to the principal of his debt. But o this rule there are some exceptions, *e. g.*, if he right to redeem is disputed, and the trans- ction ambiguous, the Court may make each party ear his own costs up to the hearing, but in eneral the mortgagee unsuccessfully disputing he right to redeem, must pay the costs occasioned y such a defence. So also if he advance un- ustained charges of fraud, or raise irrelevant ssues. And where a tender has been duly made efore suit, the mortgagee will be charged with he entire costs, and if it be made during the uit, with the costs subsequently incurred (*l*). A irection ordering him to pay costs contingently n not more being due than was tendered may e inserted in the original decree (*m*). So also f he was overpaid before filing bill to foreclose, r if being in possession he has neglected or efused to render accounts after demand, he will ot be allowed costs to the hearing (*n*). If, being

Transaction obscure.

Mortgagee disputing right to redeem.

Unproved charges of fraud.

Tender.

Over-payment.

(*g*) Horlock v. Smith, 1 Coll, 298; Sandon v. Hooper, 6 Beav. 246.
(*h*) Ellison v. Wright, 3 Russ. 458.
(*k*) Ramsden v. Langley, 2 Vern. 536.
(*l*) Hoskin v. Sincock, 34 L. J. N. S. 435.
(*m*) Hoskin v. Sincock, (loc. cit.)
(*n*) Powell v. Trotter, 1 Dr. & S. 388.

a defendant to a redemption suit, he deny overpayment, he must pay costs subsequent to putting in his answer or statement in the nature of an answer.

The costs of suit are taxed as between solicitor and client.

If the mortgagee unsuccessfully appeal on any point, he must pay the costs of the appeal.

Loss of title deeds.] If the mortgagor has been ready to pay off the mortgagee, but has refused to do so in consequence of the mortgagee having lost some of the title deeds, he is entitled to his costs in a redemption suit, and also in a foreclosure suit, unless it appear that he has refused to accept a sufficient indemnity. And the mortgagee will be ordered at his own cost to give a sufficient indemnity (*o*).

Reconveyance.] The costs of the reconveyance, except so far as they are unnecessarily increased by the mortgagee's act, fall on the mortgagor, except where it is executed by the committee of a lunatic mortgagee, whose estate bears them, unless the lunatic was a mere trustee (*p*).

Lunatic mortgagee.

Enlarging time.] In a suit to foreclose, but not in a suit for redemption, except under special circumstances (*q*), the Court will, on motion, enlarge the time for the payment of the money, generally for six months, upon the mortgagor paying, before the day named in the certificate, the sum certified to be due for interest and costs, and carrying on the account of the subsequent interest computed on the principal found due, and costs. In some cases, the costs of the application have been added to the subsequent costs, but the proper order is to require them to be paid at once (*r*). If the security is not ample, this indulgence will not be granted, unless there is some excuse for default, but in other cases a first

Costs of application to enlarge.

Security scanty.

(*o*) Lord Middleton v. Eliot, 15 Sim. 531.

(*p*) Wetherell v. Collins, 3 Mad. 225; Fisher, 569.

(*q*) Faulkner v. Bolton, 7 Sim. 319; but see Tipping v. Harris, cited 17 Ves. 414; and see Eyre v. Hanson, 2 Beav. 478.

(*r*) Seton, 391.

plication will be granted on slight evidence at it is likely to be of use to the mortgagor. tronger evidence must, however, be adduced on second application, and very strong evidence r a third or fourth application. If the mortagee, by his own act, as by receiving rent, alters e state of the account after the certificate, a w account must be taken, and a new day for demption fixed, without any terms being posed on the mortgagor, unless, perhaps, where e security is clearly inadequate (*s*). So also here the mortgagee failed to attend, the mortgagor as ordered to pay within ten days after the der, but without subsequent interest, and a milar course would, it is conceived, be adopted, the registrar's office were closed on the day amed in the certificate.

Mortgagee receiving rent after certificate.

Registrar's office closed on day appointed for payment.

Final decree.] The final decree of foreclosure the case of a legal mortgage is given in Form, o. 26. An infant has a day to shew cause, but t a *feme coverte*. Where the mortgage is equitble, the defendant will be ordered to convey the gal estate to the plaintiff, and to hand over the eeds, if the plaintiff has not already obtained em, or, in a proper case, the defendant will be eclared to be a trustee for the plaintiff within e meaning of the Trustee Acts, and a vesting der made (*t*).

Where the suit is to redeem, the decree will mply direct that the plaint stand dismissed with sts, but this is equivalent to a decree of foreosure against the plaintiff.

Evidence necessary to obtain final decree.] The ly evidence necessary will be the registrar's rtificate that the money has not been paid into ourt, and an affidavit of the plaintiff that the oney named in the certificate is still due, and ving to him. As already mentioned, this form nders it necessary that the mortgagee should

(*s*) Geldard v. Hornby, 1 Ha. 251.

(*t*) See Lechmere v. Clamp, 31 Beav. 578; where the defendant sconded. Whether this would be done against an infant dedant out of the jurisdiction, unless there was evidence that h a course would be for his benefit, *quære*.

not, by receiving rent or otherwise, alter the state of account after the certificate.

Enlarging time after final decree.] Even after the final order of foreclosure, the Court has enlarged the time for payment, upon proof that payment was not made on the day appointed, through mistake or accident, or *vis major*, and that there is good reason to believe, that on a future day the money will be forthcoming. This, of course, is not readily done if the security be inadequate.

Opening foreclosure.

As observed, *ante*, p. 161, a mortgagee opens the foreclosure by pursuing any of his collateral remedies, *e. g.*, suing on the covenant in the mortgage deed, and if he has parted with the estate he will be restrained by injunction from so doing.

Injunction against mortgagee suing at law.

It would not, however, seem that such an injunction could be obtained in the County Court; since according to the practice of the Court of Chancery a new and substantive application would have to be made, not a mere motion in the suit.

Costs of an affidavit as to title deeds.

If the mortgagor require an affidavit as to the title deeds, he must pay the costs of it, and he ought to give some notice of his intention (*u*).

Equitable mortgagee may have decree for legal mortgage.

An equitable mortgagee under a written or parol agreement, or a mere deposit of title-deeds, is entitled to a decree directing the mortgagor to execute a valid legal mortgage (*v*).

Rights of parties after sale.

If a sale be effected, the parties interested in the estate have like rights as against the purchase-money, and these will be carried out by the decree made on further consideration.

Costs of defendant.

The mortgagee is entitled to his principal, interest and costs, in priority to the costs of the defendant, even where the defendant is an infant.

Receiver.] A few observations may be usefully added on the circumstances under which a receiver will be appointed by the Court.

At whose instance.

A receiver is not generally appointed on the application of a legal mortgagee, whose remedy is to take possession, except there are special circumstances which render it unlikely that he will succeed in ejectment; as where an estate was

(*u*) Weeks v. Stourton, 5 N. R. 426.
(*v*) See the form, Seton, 43.

rtgaged as a surety estate, with a proviso that mortgagee should not take possession unless mortgagor's own estate should prove insuffi-nt, and the surety by his answer insisted that h estate had not been shewn to be insuffi-nt (*w*). But a second or other puisne mort-gee, or other equitable incumbrancer, is entitled the assistance of the Court to avail himself of rights, and a receiver will be in general ap-nted at his instance, but without prejudice to rights of prior incumbrancers (*x*). If, there-e, a prior mortgagee in possession swear that nething, naming a definite sum, is still due to n, no receiver will be appointed on an interlo-tory application. And by leave of the Court, t not otherwise, a prior mortgagee may bring ctment, or otherwise obtain possession after a ceiver has been appointed.

Effect of appointment.] The appointment of receiver is for the benefit of the several incum-ancers so far as they choose to avail themselves it, but the Court does not, of its own motion, propriate any part of the profits received to ir benefit, and a mere direction to keep down interest of incumbrances out of the rents and ofits, made in a suit to which the incumbrancers not parties, does not amount to an appropria-n (*y*). Therefore, if the mortgagee of a term ffer the receiver to pay the surplus rents into urt, and the term expire, the fund will be paid t to the owner of the inheritance (*z*).

Over what property appointed.] A receiver ay be appointed over any property of a nature hich could be taken in execution at law, or hich is assets in equity. Thus, there may be a ceiver appointed of a pension (*a*) of the profits an assignable office (*b*), of railway or canal

(*w*) Ackland v. Gravenor, 31 Beav. 482.
(*x*) Berney v. Sewell, 1 J. & W. 647.
(*y*) Bertie v. Earl of Abingdon, 3 Mer. 560.
(*z*) Gresley v. Adderley, 1 Sw. 573; Flight v. Camac, 25 L. J. N. S. 654.
(*a*) Noad v. Backhouse, 2 Y. & C. C. C. 529.
(*b*) Blanchard v. Cawthorne, 4 Sim. 566.

tolls (*c*) of a fellowship (*d*), but not of an eccles astical benefice involving cure of souls (*e*).

The Court may appoint a receiver, though on is not asked for by the plaint. Order V. r. 3. A to the duties of a receiver, see Order XXII., an for the form of bond to be given by him, see th Schedule, Form 33.

(*c*) Fripp v. Chard Railway Company, 22 L. J. Ch. 108
(*d*) Feistel v. King's College, 10 Beav. 491.
(*e*) Hawkins v. Gathercole, 7 De G. M. & G. 1.

CHAPTER IV.

SPECIFIC PERFORMANCE.

diction 189
hat cases Specific Perform-
e is decreed . . . 190
isites of Agreement for
le or Purchase . . . 191
acts ultra vires, *or by*
ustees 193
ment not expressing real
ention 193
ment must be concluded 194
——— *must be certain* . 194
tainty of Price . . 195
——— *other Terms* . 195
hat kind of Property a
ntract for Sale will be
cifically enforced . . 195
inty of Subject-matter . 198

Suit for Specific Performance
es 200
of Plaint . . . 203
ces 208
tute of Frauds . . 208
Part Performance . . 210

Defences—continued.
Defendant may set up Parol
Variation . . . 212
Mistake 212
Hard Bargain . . . 212
Misrepresentation . . 214
Laches of Plaintiff . . 215
Contract impossible to be en-
forced in toto . . . 216
Contract illegal . . . 216
Good Title not shewn . . 217
Special Defences . . . 219
Evidence 219
Decree at Hearing . . . 220
Certificate—Motion to vary . 222
Final Decree 224
Conveyance . . . 227
Delivery of Deeds . . 227
Dismissal of Bill . . 228
Interlocutory Applications . 228
Injunction 229
Receiver 229
Payment into Court . . 230
Ne exeat regno . . 230
Costs 230

risdiction.] The statute enacts that the nty Courts shall have and exercise all the er and authority of the High Court of Chan- (*a*) in all suits for specific performance [of] agreement for the sale or purchase of any erty where the purchase money shall not ed the sum of £500. 28 & 29 Vict. c. 99, s. 2.

1 all proceedings for orders in the nature of nctions, where the same are requisite for ting relief [in such suits] (*b*).

(*a*) Clause 4.
(*b*) Clause 8.

In such suits the judge of the County Court has, for the purposes of the statute, in addition to his former powers and authorities, all the powers and authorities of a judge of the High Court of Chancery.

Forum.

By s. 10, cl. 5, proceedings for the specific performance of agreements are to be taken in the County Court within the district of which the defendants, or any one of them, reside or resides, or carry on or carries on business.

Mode of proceeding.

The mode of proceeding is by plaint. (Order I., r. 1).

IN WHAT CASES SPECIFIC PERFORMANCE IS DECREED.

Origin of equitable jurisdiction to enforce specific performance.

The jurisdiction of Courts of Equity to enforce specific performance of agreements arises from the principle of those Courts—that what a man has promised he is bound in conscience to perform. "The ground," Lord St. Leonards says, "on which the Court proceeds is the real intention of the parties. The jurisdiction of the Court "to compel parties to do the very act which they "have agreed to perform has been productive of "the best results, and has led to a system of good "faith among Englishmen" (*b*).

Agreements for the sale or purchase of property are the only agreements which the County Courts have jurisdiction to compel the performance of *in specie*.

Agreements for the sale or purchase of property imply a seller or vendor and a purchaser—a subject-matter and a price.

As the limitation of the jurisdiction in specific performance of agreements for sale or purchase is when the purchase money shall not exceed £500 it must be understood that the statute gives no jurisdiction except where the price is a gross sum. Such gross sum, however, may be payable by instalments (*c*).

In County Court price must be a gross sum.

(*b*) French v. Mascall, 1 Jones & Lat. 465.
(*c*) Buck v. Lodge, 18 Ves. 450.

The subject-matter of the sale or purchase is to "*Property*"—a very wide expression, but it is ich restricted by the practice of Courts of uity, who only in general decree specific per- mance of agreements for the sale and purchase particular descriptions of property. Subject-matter, of contract.

Requisites of an agreement for sale or purchase.] order to constitute an agreement for sale hich involves an agreement for purchase), the ler and purchaser must have one mind upon terms of the bargain. If the one party ended to sell upon one set of terms, and the ier party intended to buy according to a dif- ent set of terms, there is in reality no agree- nt between them (*d*). To constitute a contract all, there must be what the civil lawyers call *consensus in idem*, without which there is no reement at law or in equity. 1. *Consensus in idem.*

The seller and purchaser must be competent to ntract, and the remedy under the contract must mutual (*e*). An infant cannot be sued at v or in equity on a contract for the sale or rchase of property, and therefore he cannot sue equity for specific performance, though he y sue at law for a breach of the contract, if it s for his benefit (*f*). 2. Competent parties.

Where the contract to which a lunatic is a ty is not merely executory, but partly exe- ed, it is not void at law if the other party did know of the lunacy (*g*); but it will not be forced by a suit for specific performance in uity (*h*). A married woman can contract by a ed duly acknowledged under the Fines and Reco- ies Act (*i*), or concerning her separate estate (*k*). Married women.

d) Per Sir W. Grant, Higginson v. Clowes, 15 Ves. 516; see 24.
e) Flight v. Bolland, 4 Russ. 298.
f) Warwick v. Bruce, 2 M. & S. 205.
g) Molton v. Camroux, 2 Exch. Rep. 427, 4 Exch. Rep. 17.
h) Hall v. Warren, 9 Ves. 605. As to a mortgage by a lunatic, Jacobs v. Richards, 5 D. G. M. & G. 55; Campbell v. Hooper, n. & Giff. 153.
i) Crofts v. Middleton, 8 D. G. M. & G. 192.
k) Gaston v. Frankum, 2 De G. & Sm. 561.

Corporations.

Corporations may contract by their agent duly appointed under their common seal (*g*). Contracts by agents are valid, if they have the authority or confirmation (*h*) of their principal, and bind the principal.

Where principal is named.

Contracts by agents.] A contract by an agent will either name the principal or not. If it names the principal, then the agent is not bound to perform it, though he may be liable in damages for representing the principal as having given him authority (*i*); nor is the principal bound unless he has given such authority, if he chooses to repudiate it (*k*). A principal who has not given authority to an agent to contract on his behalf may yet adopt such a contract and enforce it (*l*).

Ratification.

Where principal is not named.

If the contract does not name the principal, then the agent is bound personally to perform the contract if the principal will not, unless the other contracting party knew of the agency (*m*); but the principal may sue upon the contract though made in the agent's name, unless it is proved that the contract would not have been made with the principal if his name had been disclosed, and the contract is one the benefit of which could not be assigned against the will of the other contracting party (*n*).

Contracts by promoters of companies.

Railway companies are so far bound by the agreement of their promoters, that if they avail themselves of that agreement they will, on the ground of part performance, be compelled to perform the whole of it, though the agency of the promoters is not constituted in the usual way (*o*). It is doubtful, however, whether Lord Cottenham's view, that a railway company is

(*g*) Carter v. Dean of Ely, 7 Sim. 227.
(*h*) Ridgway v. Wharton, 6 H. L. Cases, 238.
(*i*) Collen v. Wright, 8 El. & Black. 647.
(*k*) Howard v. Braithwaite, 1 V. & B. 202.
(*l*) Ridgway v. Wharton, (*loc. cit.*)
(*m*) At law, Higgins v. Senior, 8 M. & W. 844. In Equity, see Taylor v. Salmon, 4 M. & C. 134.
(*n*) Nelthorpe v. Holgate, 1 Coll. 203.
(*o*) Lindsey v. Great Northern Railway Company, 10 Hare, 664, following Edwards v. Grand Junction Railway Company, 1 M. & Cr. 650.

und by the agreement of its promoters, that if position is withdrawn to the passing the bill by ıich the company is to be constituted a sum of ɔney shall be paid by the company to the party thdrawing it, is sound (z).

Contracts ultra vires or by trustees.] Corporations constituted for special purposes, as *e.g.* railway companies, have only power to buy property r the purposes of their constitution; a railway mpany could not buy a steamboat without wers being given it for that purpose, or *vice rsâ* (*a*). They are to this extent trustees for a ecial object. Railway companies.

Trustees who contract to sell or buy (even without disclosing their trust) will not have a contract to l the trust property enforced against them, ıich is a breach of trust, such as an improvident e, or a sale under improper conditions; nor ɔuld a contract to buy be enforced out of the ıst funds, if such a contract was improper. A cree might be made against the trustees, but if ey could not pay the purchase money, it would ly result in their going to prison for the costs. Agreements for sale by trustees.

Agreement not expressing real intention of the rties.] If the agreement which is sought to be forced is not evidenced by writing, and it is empted to be enforced at law by an action for e non-performance of it; the defence that ither the plaintiff nor the defendant agreed to e terms which the plaintiff is seeking to enforce available at law (*b*). Parol agreement

If the agreement which is sought to be forced is evidenced in writing, and if the judge the Court in which it is sought to be enforced hose province it is to construe the writing) of opinion that the parties have not come to e same terms, such an agreement cannot be ed upon at law.

(z) Preston v. Liverpool, Manchester and Newcastle Railway mpany, 5 H. L. 621; see Bedford and Cambridge Railway mpany v. Stanley, 2 J. & H. 746.

(a) Colman v. Eastern Counties Railway Company, 10 v. 1.

(b) Starkie on Evidence, Pt. IV. p. 1018.

But the written contract or memorandum of the contract may not be in conformity with the real meaning of both parties to the contract, which may have been different; and this difference could not be proved at law, as the law rejects parol evidence when written evidence is to be had (*b*).

In such a case, equity exercises its jurisdiction of setting aside the written agreement, of which jurisdiction we shall treat hereafter (*c*), as in fact there was no agreement at law, or in equity, but by a mistake, an agreement has been entered into in writing.

If there is a mistake on the part of one party only to the agreement, that may be a defence to a suit to enforce it in equity (*d*).

Agreement must be concluded.] It is essential that the agreement be concluded if the transaction amounts only to treaty, it will not sustain a suit (*e*). There must be not merely a treaty, much less a proposal for an agreement; but a treaty with reference to which mutual consent can be clearly demonstrated (*f*).

Notice to treat under Lands Clauses Consolidation Act.

Illustrations of this principle may be drawn from the decisions as to a notice to treat given by a railway Company to a landowner; this, *simpliciter*, does not make a contract between the parties (*g*), yet when the price is ascertained in the manner pointed out by the Lands Clauses Consolidation Act, the Company may get a decree for specific performance against the landowner (*h*), and the landowner may get a similar decree against the Company (*i*).

Certainty of subject-matter and price sufficient.

Contract must be certain.] It follows from this that there must be certainty as to the subject-matter and certainty as to the price; if these are

(*b*) Starkie on Evidence, Pt. IV. p. 1018.
(*c*) See *infra*, Chap. V.
(*d*) Malins v. Freeman, 2 Keen, 25.
(*e*) Stratford v. Bosworth, 2 V. & B. 341.
(*f*) Per Lord Eldon in Kennedy v. Lee, 3 Mer. 441.
(*g*) Adams v. Blackwall Railway Company, 2 Mac. & G. 118; Haynes v. Haynes, 1 Dr. & Sm. 426.
(*h*) Regent's Canal Company v. Ware, 23 Beav. 575.
(*i*) Mason v. Stokes Bay Company, 32 L. J. Chy. 110.

ted, although nothing is said as to other terms, ere is certainty enough; the law implies the her terms. If I offer by letter to sell a field r £1000, and another agrees by letter to buy it that price, there is a binding agreement be- veen us; the law implying the other terms of e contract. That construction which is most vourable to the purchaser is to be adopted (*k*).

Certainty of price.] The rule of certainty does ot require the price to be fixed by the contract self, it is sufficient if the contract point out the ode in which the price is to be ascertained: *id certum est quod certum reddi potest.*"

If the price is neither ascertained nor ascer- inable, there is no contract. If it is to depend pon arbitration or valuation, the decision of the rbitrators or valuers must be made and complete efore the contract can be enforced (*l*).

Certainty of other terms.] If other terms are ntroduced into the contract, there must be cer- inty as to them; for although the Court will im- ly the other terms if the price and subject-matter re fixed, yet if other terms are imported into ne agreement, the Court, whose province it is to erform the whole agreement, will not act if nose terms are uncertain (*m*).

Of what kind of property a contract for sale will e specifically enforced.] Before we enter upon ne question of certainty as to the subject-matter f the contract of sale, we had better consider ne question what are the descriptions of property ne sale of which the Court will enforce *in specie*.

Damages an adequate compensation.

As a Court of Equity does not interfere except o supply a defect in the ordinary tribunals, it is rule of its jurisdiction in specific performance, nat it will not interfere if the damages which an be obtained at law for non-performance of

(*k*) Symons v. James, 1 Y. & C. C. C. 487; Seaton v. Mapp, Coll. 562; Rhodes v. Ibbetson, 3 D. G. M. & G. 787. Agree- ent for lease for seven, fourteen, or twenty-one years means at ption of tenant; Hersey v. Giblett, 18 Beav. 174.

(*l*) Darbey v. Whittaker, 4 Drew. 134; compare Jackson v. ackson, 1 Sm. & G. 184.

(*m*) Taylor v. Portington, 7 D. G. M. & G. 328.

the contract are an adequate remedy for the breach (*n*).

Damages where vendor cannot make title.

If the vendor cannot make a good title to land, no damages will be recovered at law for the loss of the bargain (*o*) unless there has been a culpable want of truth in the vendor (*p*).

Contracts for the sale of goods, &c., not specifically enforced,

As a general rule the Court of Chancery does not enforce specific performance of contracts for the purchase of goods, wares or merchandize, if there is a remedy at law (*q*). The purchaser, instead of seeking specific performance by compelling delivery of the very goods he has contracted to buy, may go into the market and buy others equally as good, and if he has to pay more for them the damages he can recover at law for the seller's breach of contract will indemnify him.

On this account the Court has refused to decree specific performance of agreements to sell South Sea stock (*r*), corn crops, &c. (*s*), or coal (*t*).

except in special cases.

If, however, damages at law would not be an adequate remedy on account of the peculiar value to the purchaser of the chattels, the contract will be enforced in equity; thus contracts have been enforced for the sale of railway shares (*u*), the supply of which is not, like that of consols, practically unlimited; of iron to be delivered and paid for by instalments (*v*), timber (*w*), statues, family pictures and furniture (*x*), stock on a farm (*y*), and debts proved in bankruptcy (*z*).

(*n*) See Clayton v. Illingworth, 10 Hare, 451.
(*o*) Flureau v. Thornhill, 2 W. Bla. 1078.
(*p*) Sikes v. Wild, 32 L. J., N. S., Q. B. 375.
(*q*) Buxton v. Lister, 3 Atk. 383.
(*r*) Cud v. Rutter, 1 P. W. 570.
(*s*) Buxton v. Lister, *loc. cit.*
(*t*) Pollard v. Clayton, 1 K. & J. 462.
(*u*) Duncuft v. Albrecht, 12 Sim. 189.
(*v*) Taylor v. Neville, cited 3 Atk. 384. See V. C. Wood's Observations, 1 K. & J. 462.
(*w*) Mason v. Mason, in Clavering v. Clavering, Moseley, 224; Arkwright v. Stoveld, 1 C. P. Cooper, 499.
(*x*) Arundell v. Phipps, 10 Ves. 149.
(*y*) Nutbrown v. Thornton, 10 Ves. 159.
(*z*) Adderley v. Dixon, 1 Sim. & St. 234.

It may happen that the contract is such that no relief can be obtained at law, in this case, if relief is not given in equity relief cannot be given at all, and until Sir Hugh Cairns' Act, such relief in case of a contract for sale could only be specific performance: on this principle the Court enforced agreements for the delivery of scrip receipts for Neapolitan stock, where the plaintiff could not bring an action upon the contract (*a*), and for the sale of a chattel where the money had not been paid though a receipt had been given for it which would be an answer at law (*b*). Contract sometimes enforced because no remedy at law,

Notwithstanding there can be no relief at law, yet a contract for the sale of chattels will not be necessarily enforced in specie in equity if its performance would be to the ruin of one side; and if trifling damages only would be recovered at law had the right to the relief existed.—Besides this, it is obvious that in a commercial country like ours, the principle of allowing the specific performance of agreements for the sale of chattels, and the consequent remedy by restraining the vendor from selling them, and compelling the purchaser to take them, would introduce an amount of delay and inconvenience which has always properly prevented the Court from extending the remedy to these cases. but not necessarily.

As the Court has now, under Sir Hugh Cairns' Act, 21 & 22 Vict. c. 27, s. 2, power in all cases in which it has jurisdiction to entertain an application for the specific performance of any contract, to award damages in substitution for specific performance, it is obvious that, in cases where on a contract for the sale or purchase of chattels, a Court of equity had jurisdiction to direct specific performance, it will now have jurisdiction to decree damages instead of specific performance. Power of Court of Chancery to award damages

All descriptions of interest in land are consi- Where subject-

(*a*) Wright v. Bell, Daniells' Ex. Rep. 160.
(*b*) Lynn v. Chaters, 2 Keen, 521.

matter of contract is of peculiar value, specific performance enforced.

dered of so peculiar a value, that contracts for the sale of them have always been enforceable by the Court: so of ships (*c*) and barges (*d*), the goodwill of a business (*e*), a personal annuity (*f*), copyright of a book (*g*), life interests in personalty, and generally all limited interests under settlements of personalty, and all future expectant and contingent interests of any kind, as the interest of a next of kin in a lunatic's personal property (*h*).

Lease.

An existing lease may be the subject of a contract of sale which the County Court will enforce; and not only so, but it is possible an agreement for a lease may be enforced as for the sale of property, when by the agreement a fine or premium is to be paid for the lease to the landlord, but not when the lease is merely to be at a yearly rent, without any fine or premium.

Release of a right.

The release of a right for a money consideration, may be the subject of a contract which may be enforced in the County Court.

Certainty of subject-matter.] The nature of the subject-matter of the contract being ascertained, in order to induce the Court to act, its certainty is a necessary element in the validity of the contract. That certainty may only appear from subsequent events, as the sale of expectancies under the will, or on the intestacies of living persons (*i*); a sale of the allotment which the Commissioners of Inclosure would give a commoner (*k*).

Specific performance with compensation.

Courts of equity enforce the specific performance of contracts for sale very frequently when there is no right to relief at law, in consequence

(*c*) Lynn v. Chaters, *loc. cit.*
(*d*) Claringbould v. Curtis, 21 L. J. N. S. Ch. 541.
(*e*) Churton v. Douglas, John, 174.
(*f*) Clifford v. Turrell, 1 Y. & C. C. C. 138; Pritchard v. Ovey, 1 J. & W. 396.
(*g*) Chappell v. Purday, 4 Y. & C. 424.
(*h*) Hinde v. Blake, 3 Beav. 234.
(*i*) Beckley v. Newland, 2 P. W. 182.
(*k*) Kingsley v. Young, 17 Ves. 469; Alexander v. The Duke of Wellington, 2 R. & M. 35.

the plaintiff having neglected to comply with the exact terms of the contract: thus a vendor may have inaccurately decribed a lease-hold interest for twenty years and nine months a leasehold interest for twenty-one years, or have otherwise committed an inaccuracy which would defeat an action at law at his suit: a Court of equity will allow him to enforce specific performance, and compel the purchaser to take compensation for the misdescription; this right of the vendor to file a bill for specific performance with compensation of course involves a corresponding right on the part of the purchaser.

The purchaser, indeed, has a right to receive compensation of a much more extensive character than his obligation to take it. Generally a purchaser has a right, if the vendor has not all the estate which he contracted to sell, to insist on taking what the vendor has, with compensation for what he has not. Where a party has entered into a contract for the sale of more property than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent, but it is not universally the rule that he can get compensation for what he cannot get.

Not granted if difference very great.] If the difference is very material, and was unknown to the vendor and purchaser, the principle cannot be applied; the Vice Chancellor of England said it need not be applied when a large part of the property cannot be conveyed (*l*). Lord Langdale said it did not apply when a tenant for life contracted to sell the fee (*m*); there is such a mistake common to the contracting parties as to quantity or quality of estate that it would be making a new contract to compel the vendor to sell, at a price to be fixed by the Court, what he never intended to sell, and what the purchaser never intended to buy; nevertheless, if the purchaser

(*l*) Wheatley v. Slade, 4 Sim. 126.
(*m*) Thomas v. Dering, 1 Keen, 729.

chooses to take the lesser interest without compensation, the vendor, who ought to know what it is he is selling, must convey it at the price agreed for (*n*).

If the purchaser knew of the defect, he cannot have compensation (*o*).

SUIT FOR SPECIFIC PERFORMANCE.

Generally a stranger to the contract not a proper party.

Parties.] Generally the parties to the contract only can be made parties to the suit. If A. contracts to sell to B., B. can sue A. only for specific performance. If C. is bound to concur in the conveyance at A.'s instance, it is A.'s business to make him do so, but a right on A.'s part to make him do so gives B. no right to make C. a defendant to the suit.

Equity in a suit for specific performance only follows the law in an action for breach of contract; the circumstance that the contract is one which the defendant is unable to perform without the concurrence of some other person whom he cannot compel to do so, is an objection to the performance of the contract but no ground for making that other person a party to the suit.

Take the case of a tenant for life, whose consent is necessary to the sale of an estate by trustees, himself, as is not uncommon, agreeing to sell the estate; a bill against the trustees to compel a sale would be dismissed (*p*).

Agents.

If the contracting parties, or one of them, are stated to be agents for others, of course the principals, and not the agents, are the parties to the suit. If the contracting party is an agent who does not name his principal; the principal suing must make the agent a party, otherwise another suit may be instituted against the

(*n*) Earl of Durham v. Legard, 34 L. J. Ch. 589.
(*o*) Maw v. Topham, 19 Beav. 576, *infra*, p. 213.
(*p*) Thomas v. Dering, 1 Keen, 729.

gent (*q*); it is said the agent cannot sue in his wn name without making the principal a arty (*r*).

The benefit of contracts may be assigned unless here is anything in them personal to the contracting parties; as in contracts to enter into artnership, or to grant leases; but the assignee annot enforce a contract for sale without aaking the assignor a party to the suit. In act, the same rule applies as in the case of an ndisclosed principal. Where contract assigned.

Although, as a general rule, no persons but the ontracting parties can be parties to the suit, ersons claiming the benefit of the contract adersely to the contracting parties may be made arties to the suit, in order to prevent multiplity of suits; thus when A. sold to B., and B. was erved with notice by C. to pay the purchase oney to C. and not to A., B. was entitled to file a ll against A. and C., and C. had to pay the costs of ie suit (*s*). So if A. sells land to B., in the occuation of C., as tenant to A., and C. denies the nancy, and sets up a title, C. may be made to ay the costs of a suit which he has thus occaoned; this, however, arises from the principle iat the Court will enable any person who admits mself to be a trustee, safely to execute his trust; id the seller and purchaser being, in a certain nse, after the contract, trustees respectively of ie property sold and the purchase money, if iird parties, by claims, make the execution of ie trust difficult, such third parties shall pay the osts of a suit instituted to enable the trustee fely to execute his trust. Exceptions to the general rule.

Contracts for the sale of property may be enorced at the suit of and against parties claiming nder the contracting parties respectively. We ave mentioned the assignment of the benefit of Assignees of the subject of contract.

(*q*) Cope v. Parry, 2 J. & W. 538. This was the case of a ustee, but the principle is the same.
(*r*) Small v. Attwood, Younge, 457.
(*s*) Collett v. Hover, 1 Coll. C. C. 227.

the contract. If the property the subject of the contract is assigned to another person, either for valuable consideration with notice, or voluntary with or without notice of the original contract, such assignee may be compelled to convey the property at the suit of the purchaser.

It not unfrequently happens that two sets of persons have power to sell property—*i. e.*, trustees for sale and the *cestuis que trustent* if *sui juris*; mortgagor and mortgagee. If either of these two sets makes a contract with a purchaser, and both join in a conveyance to another purchaser who has notice of the first contract, the first purchaser can enforce the contract against the second (*t*).

Death of vendor.

If the seller of freehold land dies before the contract is performed, his personal representative is entitled to the benefit of the contract, and can alone sue for the specific performance of the contract; but the heir or devisee must be a party to the suit (*u*). In this case the purchaser must sue the heir or devisee as having the property, and make the personal representative a party as the person to receive the money. The creditors of the vendor may compel the executor to enforce the contract, but could not have enforced it themselves unless they alleged that the executors declined (*v*), when, on the principle we have before considered of making a debtor to the estate a party to an administration suit (*w*), the creditors may themselves sue.

If a person having a power to sell and convey real estate enter into a contract to do so, and dies without having conveyed, the contract may be enforced against the person entitled to the estate, in default of execution of the power.

Death of purchaser.

If the purchaser of real estate die, the contract may be enforced against his personal representative, or by his real representative: the other representative being a necessary party to the suit.

(*t*) Lightfoot v. Heron, 3 Y. & C. Ex. 186.
(*u*) Roberts v. Marchant, 1 Phil. 370.
(*v*) Johnson v. Legard, T. & R. 281.
(*w*) *Supra*, p. 58.

If the vendor of real estate becomes bankrupt, he retains the legal estate, but the right to the purchase money goes to his assignees. If the purchaser becomes bankrupt, his assignees may either repudiate or perform the contract (*x*). Vendor or purchaser bankrupt.

If the contract for sale of real estate is made by a married woman by deed acknowledged, her husband must be a party to a suit by the purchaser, and he must be a co-plaintiff with her to enforce it. Contract by married woman.

If a contract for sale or purchase is made by a married woman having separate estate; for the sale of that estate to the extent of her power to do so, or for the purchase of property with the funds belonging to her separate estate, she, her husband and the trustees of the separate estate must be parties to the suit.

Form of plaint.] A plaint for specific performance must state the contract: if the purchaser be the plaintiff, and the contract a formal contract in writing for sale be of freehold property, the form is given in Form 7. If the sale be of any other interest in property, the interest must be described. It will be assumed that the seller had power to sell the property he has agreed to sell, but if the plaintiff is aware of the state of the title, and the relief he desires depends upon this, it should be specifically stated.

Thus, if the contract be one in which, from a defect in or an incumbrance on the title, the Courts are in the habit of giving the purchaser a right to take what the seller can give him, with compensation for what he cannot give him, it is usual, in order to preclude the objection that the plaintiff had knowledge of the defect when he purchased, to allege that the defendant was, or pretended to be, well entitled to the property which he contracted to sell; and it is proper to state the claim for compensation on the plaint, and if such a claim is made and wilfully kept back, it may bar the plaintiff's claim to that Plaint by purchaser seeking performance with compensation.

(*x*) 12 & 13 Vict. c. 106, s. 146.

relief, though he will be generally entitled to it if the defect appears in the ulterior proceedings though not asked for.

Contract by letters.

If the contract be not a formal contract in writing, but has to be extracted from letters, the pleader must either allege the letters as constituting the agreement, in which case they must be set out, or as evidence of the agreement, in which case it is not necessary to set them forth, but advisable so to do (*y*); and it must appear that they imply a concluded agreement; and care must be taken to distinguish between stating letters containing the contract, and letters as evidencing the contract.

Parol agreement.

If the contract be a parol contract, the effect of it should be stated as a contract, and any admission of it by the defendant must be specially stated in the plaint.

Part performance.

If the contract be a parol contract for sale of an interest in real estate, and part performance is relied upon to take it out of the Statute of Frauds, the agreement must be alleged with great care, since, if the terms do not distinctly appear conformable with the act alleged as a part performance, the plea of the statute will be allowed. Indeed, some judges have thought that the terms of the agreement ought to appear from the act of part performance, which can seldom be the case.

Sale by auction.

If the agreement alleged be a sale by auction, the fact of the conditions of sale, if any, affecting the title must be stated, as the title must be taken subject to those conditions.

Vendor in occupation.

If the vendor has been in the actual occupation of the property, this should be stated, as the ordinary decree for an account of the rents from the day fixed for settlement is only for what he has received, and this would not include an occupation rent. If the account is asked to be taken against the vendor for what he might have received but for his wilful default, this case must be made and specially prayed for (*z*).

Wilful default.

(*y*) Brice v. Bletchley, 6 Mad. 17; and see *ante*, p. 13.
(*z*) Sherwin v. Shakspeare, 5 De G. M. & G. 517.

If the vendor be the plaintiff, he should state that he was entitled to the interest in the property he agreed to sell at the time he made the contract. Plaint by vendor.

If he seeks to have the contract performed with compensation, the plaint must show that the defect is capable of compensation, or it will be bad on the face of it. Compensation.

It is seldom that a suit is commenced for specific performance of a contract of sale without some knowledge on the part of the plaintiff why the defendant will not perform his agreement. This is in general on the part of the purchaser, from his objecting to the title shown, or a defect in the property.

It is seldom that the vendor if plaintiff can be advised to state upon his pleadings the question of title which forms the objection of the purchaser, the vendor being allowed to improve the title pending the suit, and the purchaser being allowed to insist upon other objections to it than those he has already stated. It is better for a vendor plaintiff to state generally that the defendant refuses to perform the contract. Vendor's plaint should not raise question of title.

If the defence is a defect in the subject-matter of the contract, the vendor plaintiff should, if he can show that the purchaser was aware of this defect (either because it was patent or because he was expressly informed of it), state this in his plaint. Alleging knowledge by defendant.

Both vendor and purchaser in their plaints, if a considerable time has elapsed since the contract was to have been performed, must account for the delay. Lapse of time.

If time was to be originally of the essence of the contract, that objection to the plaint can only be got rid of by alleging a waiver on the part of the defendant, a question which must be decided at the hearing (*a*).

Even if the plaintiff is not aware of the line of defence which may be taken by the defendant, as he has no power of amending his plaint when the Anticipating probable defence.

(*a*) Levy v. Lindo, 3 Mer. 81.

defence is put in, he had better allege the probable defence by way of pretence, and then get rid of the defence by additional allegations. It is possible that some judges may allow the plaintiff to meet a defence by amendment, but this cannot be safely assumed.

Conditional contract.

If the contract for sale is conditional, as, for instance, a right of pre-emption given to a lessee upon notice, the notice must be alleged: so if the property sold be a leasehold interest which cannot be assigned without the consent of the lessor, his consent should be stated.

Purchaser must give personal indemnity against vendor's personal liability,

It is a general principle of equity that the purchaser of an interest which the seller holds subject to incumbrances is bound to indemnify the seller against that liability. A familiar case is the sale of a leasehold interest by the lessee who has entered into covenants with the lessor; the purchaser is bound to covenant to indemnify the lessee against the performance of those covenants, and to perform them himself (*a*). So the purchaser of an equity of redemption is bound to covenant to pay the mortgage money (*b*). Apparently, the purchaser of freehold land which the vendor has covenanted not to build on, or of a freehold house which the vendor has covenanted not to deal with in any particular manner, must engage to perform these covenants (*c*).

but purchaser without notice not bound to do this.

In these cases the vendor's plaint should state the obligation he is under, and that the defendant had notice of it, if that is the fact, if it is not the fact, the obligation should still be stated, or the purchaser must elect whether he will perform it or reject the contract, as he is, if ignorant of the obligation, entitled to do (*d*).

It will be seen more clearly, when we examine the nature of the defences to the suit, what the

(*a*) Pember v. Mathers, 1 B. C. C. 52; Staines v. Morris, 1 V. & B. 8.

(*b*) See 7 Ves. 337, per Lord Eldon; Jones v. Kearney, 1 Dr. & W. 155, per Lord St. Leonards.

(*c*) Moxhay v. Inderwick, 1 D. G. & S. 708.

(*d*) Lukey v. Higgs, 24 L. J. N. S. Eq. 495.

plaintiff must allege, for it may be stated generally that he must, if he can, obviate those defences by the statement of circumstances which exclude them.

Pleading written agreement.

It is sufficient to allege that the agreement was in writing, without alleging that it was signed by the defendant (*e*); but it is not enough to allege an agreement which ought to be in writing, without alleging it to be in writing: and a plaint alleging an agreement relating to land, without stating that it was in writing, is bad on the face of it (*f*).

Power of Court to award damages.

The Act 21 & 22 Vict. c. 27, s. 2, enacts (*inter alia*) that in all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or substitution for such specific performance.

It is usual in bills for specific performance to ask for damages in addition to or in substitution for the other relief prayed. There is no question as to the power to give damages in addition to specific performance, and it seems that such jurisdiction existed before the statute (*g*). But the Court could not before the statute give damages in substitution for specific performance (*h*). If the Court could not before the statute decree specific performance at all, it has not now (*i*) jurisdiction to give any damages; but the Court can now, in a case where there is jurisdiction to decree specific performance, if it considers it inexpedient that the agreement should be decreed to be performed *in specie*, give damages in lieu of such decree (*k*).

(*e*) Rist v. Hobson, 1 S. & S. 543.
(*f*) Barkworth v. Young, 4 Drew. 1.
(*g*) Nelson v. Bridges, 2 Beav. 244.
(*h*) Sainsbury v. Jones, 5 M. & Cr. 1.
(*i*) Rogers v. Challis, 27 Beav. 175.
(*k*) Soames v. Edge, Johns. 669; Howe v. Hunt, 32 L. J. Rep. N. S. Eq. 36.

Implied acceptance of title.

If the plaintiff is vendor, and insists that the purchaser has waived his right to inquiry as to the title, the waiver must be stated on the plaint (*l*). Taking possession (*m*) and other acts of ownership (*n*), when not consistent with the terms of the contract (*o*), and after knowledge of the objection to the title, are treated as waiver of the objection. *Primâ facie* taking possession after an abstract has been delivered, is a waiver of the objections appearing on the abstract (*p*).

DEFENCES.

Statute of Frauds.] If the agreement is for a sale of an interest in land, the defendant may insist on the Statute of Frauds, unless the plaintiff allege that its provisions have been complied with.

In the Court of Chancery, if the Statute of Frauds is not set up by a plea, or the bill is not demurred to, it cannot be made available at the hearing (*q*), and the County Courts will probably require that it be either pleaded, or that a statement in the nature of a demurrer be put in. It is not, however, one of the special defences of which notice is required to be given.

The statute requires that the agreement for sale of an interest in land, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

What is an interest in land to be within the statute is sometimes an important question. It is held that growing timber (*r*) or a share in a

Timber.

(*l*) Clive v. Beaumont, 1 D. G. & S. 397.
(*m*) Burnell v. Brown, 1 J. & W. 168.
(*n*) Letting the property; *Ex parte* Barrington, 2 Mont. & Ayr. 245. Advertising the property for sale; Simpson v. Sadd, 4 D. G. M. & S. 665.
(*o*) Stevens v. Guppy, 3 Russ. 171.
(*p*) Bown v. Stenson, 24 Beav. 631.
(*q*) Skinner v. McDouall, 2 De G. & Sm. 265.
(*r*) Scorell v. Boxall, 1 Yo. & Jer. 396.

mining company is not within the Statute of Frauds (*rr*) any more than it is within the Statute of Mortmain.

Informal contract, letters, &c.

The agreement is very often contained in informal documents, particularly in letters, and more difficulties have arisen upon letters than on any other informal writing.

If the letters contain the agreement, it must be clear that they contain all the essential terms, which are, as we have seen, the subject-matter and the price.

It is often the opinion of both seller and purchaser that they have entered into a contract by letters when they have not. An acceptance by a letter of an offer to buy or sell must not introduce a new term. A strong case is: where A. offered to purchase a house on certain terms, possession to be given on or before the 25th of July, and B. agreed to those terms, and said he would give possession on the 1st of August, there was no contract (*s*).

If a note or memorandum of the agreement is signed it is enough, although the agreement itself is not signed; but the agreement must be in writing, and the note that is signed must distinctly refer to that agreement, so as to identify and incorporate it.

If all the terms of the agreement are stated in any informal writing, as a letter or deed or an affidavit which is signed by the defendant, it is sufficient.

Parts of an entire agreement cannot be separated and each must be properly proved.

Where a parol agreement is entire, and relates to matter which, by the Statute of Frauds, renders it necessary that it should be in writing, as also to matter which, if it were alone the subject of the contract, would require no such writing, the two parts of such an agreement cannot be separated, and the whole is void (*t*).

(*rr*) Watson v. Spratley, 10 Ex. 222.

(*s*) Routledge v. Grant, 4 Bing. 653; so in Chinnock v. Galsworthy, 6 N. R. 1.

(*t*) Harvey v. Grabham, 5 Ad. & Ell. 61.

Signature of agreement.

It is enough if the writing be signed by the defendant, the party to be charged, or his agent; and if the name be inserted in such a manner as to authenticate the document, as in a letter in the third person, the statute is satisfied (*u*). A signature may be in pencil (*v*) and by initials (*w*), and the agent need not be appointed in writing (*x*).

Part performance.] A Court of Equity will not, however, allow the Statute of Frauds to be an objection to the decreeing specific performance of a parol contract, if it has been partly performed by one of the parties to such an extent that it would be a prejudice to the party who has performed it if the statute should be taken advantage of by the other (*y*).

If the plaintiff can get relief at law against the damage he suffers by the act of part performance, as he can when he has paid a portion of the purchase money (*z*), he cannot have the contract performed.

Principles of the Courts.

It would often happen that damages would be an adequate remedy for the wrong which the plaintiff has suffered, but he cannot recover damages because there is no contract at law. If the plaintiff cannot get relief in equity, he gets no relief at all; and the proper relief in equity is specific performance.

Taking possession, laying out money, &c.

Possession is an act of part performance, taking a parol contract out of the statute. If a purchaser is let into possession by the vendor, in pursuance of a contract of sale, the vendor cannot eject him as a trespasser, ignoring the contract on the ground of its being parol; either party, therefore, may enforce the contract. Expenditure of money by the purchaser, with the knowledge of the vendor, and in accordance with the contract, of

(*u*) Compare Ogilvie v. Foljambe, 3 Mer. 53, and Stokes v. Moore, 1 Cox, 219.
(*v*) Lucas v. James, 7 Hare, 410.
(*w*) Sug. V. & P. 13th ed., p. 116.
(*x*) Coles v. Trecothick, 9 Ves. 234.
(*y*) Gunter v. Halsey, Amb. 586.
(*z*) Griffiths v. Young, 12 East, 513.

course makes a stronger case of part performance, because the injury to the purchaser is greater if he is ejected from the occupation and unable to recover his money.

Purchaser committing waste.

Again, if a purchaser is allowed by the vendor to enter into possession, and then commits what is called equitable waste, that is, does acts which are incapable of being estimated in damages, such as cutting down ornamental timber, he will not be allowed to throw up the contract if the vendor insists upon his performing it.

Such acts by a purchaser as amount to a waiver of inquiry as to title will amount to a part performance by him, which entitles the vendor to force the contract on him.

Acts must be unequivocally referable to contract.

This being the principle of part performance, the application of it is attended with some difficulty, from the Court being anxious to be assured that the act is unequivocally referable to the agreement. The act cannot of itself determine the terms of the agreement, but it must arise from the agreement, and be capable of no other explanation.

Terms of agreement must appear.

The Court will very rigidly adhere in the case of parol contracts, where parol evidence is admitted on the ground of part performance, to the rules, that a contract, in order to be enforced, must be complete, concluded, and certain. If there appear to be any term of the agreement about which the parties differ, then, as there is not a complete or concluded agreement, it cannot be performed; in fact, there is no agreement at all.

Contract not within Statute of Frauds.

If the contract is not for the sale of an interest in land, it need not be in writing, thus a parol agreement for the sale of railway shares is binding (*zz*); but if it is in writing, the rules of evidence prevent any aid being given to it by parol evidence, the writing must speak for itself, and there is no difference between the rules of equity and law as to this point in reference to plaintiff's case (*a*).

(*zz*) Duncuft v. Albrecht, 12 Sim. 189.

(*a*) Clowes v. Higginson, 1 Ves. & B. 524; Winch v. Winchester, 1 Ves. & B. 375.

Defendant may set up parol variation.] It is open to the defendant, however, to insist that there were other terms which are not in the writing (*b*).

If the defendant could, on a bill to rectify the contract, obtain a decree, the plaintiff may be compelled to perform the contract as varied by the defendant's evidence (*c*). Unless the plaintiff will submit to and perform the contract as stated by the defendant, the plaintiff cannot obtain a decree, although if the defendant were himself the plaintiff, he could not obtain a decree according to his parol evidence (*d*).

Mistake.] Assuming the agreement to be admitted as entered into, yet the defendant may show that there was mistake on his part: if, as we have seen, the mistake was on both sides, there is, in fact, no contract at all, and it will be rescinded in a suit for that purpose; if the mistake was only on the part of the defendant, he may set it up as a defence. But the mistake must be in all cases one of fact and not of law (*e*), one affecting the very subject of the contract (*f*), and must have existed at the time of the contract being made.

Hard bargain.] The contract may be admitted, and there may be no mistake in it, but if it is a hard bargain on the defendant it will not be enforced by the Court (*g*), particularly if the defendant is the purchaser. It is, however, a very strong case that must be made out; a purchase of a thing which will be useless to the defendant was in one case (*h*) not enforced; so where it

(*b*) London and Birmingham Railway Company v. Winter, Cr. & Phill. 57.

(*c*) Joynes v. Statham, 3 Atk. 388.

(*d*) Higginson v. Clowes, 15 Ves. 316; Clowes v. Higginson, 1 Ves. & B. 524; Squire v. Campbell, 1 M. & C. 480.

(*e*) Price v. Dyer, 17 Ves. 356; see Hood v. Oglander, 6 N. R. 57, and Stone v. Godfrey, 5 D. G. M. & G. 76.

(*f*) Okill v. Whittaker, 1 D. G. & S. 83, 2 Phill. 338.

(*g*) Gould v. Kemp, 2 M. & K. 308.

(*h*) —— v. White, 3 Sw. 108; see Clarke v. Moore, 1 Jones & Lat. 728.

ends to the ruin of one party (*i*). Too much reliance must not be placed on the application of this objection in practice, Lord Thurlow thought little of its force (*k*).

Hardship good defence against performance with compensation.

The objection of hardship is, indeed, a strong objection to a suit by a purchaser for specific performance with compensation. It may be generally true that a purchaser is entitled to all that a vendor can give him, with compensation for what he cannot give him; but this principle will not be applied when its application will injure third parties (*l*), when a considerable share of the estate cannot be conveyed (*m*), where the property turns out to be much less in acreage than it was believed to be (*n*). The plaintiff will not, it seems, be entitled to take what the vendor can give him with an abatement, if he knew of the defect in title to the whole of the subject at the time of the contract (*o*).

Purchaser knowing of defect.

Vendor discovering defect after contract.

If the vendor has only a partial interest, but, *bonâ fide* believing himself to have the whole, has contracted to sell the whole, he will be allowed a reasonable time to complete the title by acquiring the whole interest (*p*), unless time were of the essence of the contract; if the purchaser is unwilling to stay, the vendor should institute a suit to enforce the contract, for it is sufficient if the party entering into articles to sell has a good title at the time of the decree (*q*).

Purchaser buying up outstanding interest.

In the interval, the purchaser cannot acquire the outstanding interest, and then resist the contract; on the contrary, if his only information as to the outstanding interest is derived from the abstract, and if he buys it, the vendor may, after

(*i*) Buxton v. Lister, 3 Atk. 383; Smith v. Morris, 2 B. C. C. 311.
(*k*) Adams v. Weare, 1 B. C. C. 507.
(*l*) Thomas v. Dering, 1 Keen, 746.
(*m*) Wheatley v. Slade, 4 Sim. 126; Maw v. Topham, 19 Beav. 576.
(*n*) Earl of Durham v. Legard, 34 L. J. Ch. 589.
(*o*) Maw v. Topham, 19 Beav. 576.
(*p*) Wynn v. Morgan, 7 Ves. 202.
(*q*) Sugd. V. & P. 13th ed., p. 223.

the purchase of this interest by the purchaser, commence a suit for performance of the contract; and if he will pay the purchaser what he has given for the outstanding interest, the purchaser must complete, and his refusal to do so was called by L. J. Turner, "most dishonest and most unjust" (*r*).

Plaintiff must come into Court with clean hands.

If the plaintiff has been guilty of any improper conduct, he is personally barred from getting the assistance of the Court. There must be no fraud or misrepresentation on his part.

Uberrima fides required.

A vendor is bound to be honest in the description of his property (*s*), and in no respect is his good faith more requisite than in the framing conditions of sale. The object of special conditions of sale is to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away. If framed so as to suppress facts known to the vendor, affecting the title, he cannot compel a purchaser to complete the contract (*t*).

Special condition.

Puffers.

A sale by auction cannot be enforced if puffers are employed unless this is distinctly stated (*u*).

Misrepresentation.] Misrepresentation operates as a bar to the suit of the person who has been guilty of it (*uu*), if the defendant relied on it (*v*).

Fraud.

If it amounts to fraud, it is a ground for setting aside the contract (*vv*). It does amount to fraud when the statement is untrue, made in relation to and before the contract, and with either a knowledge in the party making it that it is untrue (*w*), or if he does not know it to be

(*r*) Murrell v. Goodyear, 1 D. G. & J. 432.

(*s*) Deverell v. Lord Bolton, 18 Ves. 512; Jackson v. Whitehead, 28 Beav. 154.

(*t*) Edwards v. Wickwar, per V. C. Wood, 1 Law Rep. Eq. 71.

(*u*) Mortimer v. Bell, 1 Law Rep. Ch. Ap. 10.

(*uu*) Cadman v. Horner, 18 Ves. 10; Moxey v. Bigwood, D. P., 10 Jur. N. S. 597.

(*v*) Lowndes v. Lane, 2 Cox, 363; Clarke v. Mackintosh, 4 Giff. 134.

(*vv*) Maddeford v. Austwick, 1 Sim. 89, S. C. 2 M. & K. 279.

(*w*) At law, if a man, with a view to secure some benefit to himself, states a circumstance as true which he does not know to be true, and which is not true, he is guilty of fraud. Per Maule J., Evans v. Edmonds, 13 C. B. 777. However, generally

untrue with an intention thereby to make the other party enter into the contract (*ww*).

It does not amount to fraud if the party making it did not know it to be untrue, and did not make it with an intention to make the other party enter into the contract, although if the other party did enter into the contract on the faith of it, it will be a defence to a suit for specific performance. A party ought not to make a representation without knowing it to be true, and a misrepresentation, therefore, upon which the contract proceeds will be a sufficient defence.

Such misrepresentation might not be a defence to an action at law upon the contract, but it will be fatal to a suit for specific performance in equity.

Fraud, in all cases, enables the party affected by it to file a plaint to set aside the contract; and it will be more properly treated of when we deal with the rescission of contracts. It is, of course, a defence to a suit for specific performance.

Laches.

Laches of plaintiff.] Laches, on the part of the plaintiff, is an answer to his suit. He must be prompt and eager to perform on his part. Time, though not of the essence of the contract, is of great importance in the sale of everything almost except fee simple property: in the case of a house for possession (*x*); leaseholds held under ecclesiastical corporations (*y*); property in mines, or businesses (*z*); or of a fluctuating character (*a*); delay in applying to the Court is of great importance as a defence to the suit. When not originally of the essence of the contract, time may be made so by express notice; it seems, however, that such notice cannot be given by the one side unless there has been already some improper

Where time of essence of contract.

the scienter is the gist of a charge of fraudulent misrepresentation; Ormrod v. Huth, 14 M. & W. 47.

(*ww*) Brydges v. Banfill, 12 Sim. 385.

(*x*) Benson v. Lamb, 9 Beav. 502.

(*y*) Carter v. Dean of Ely, 7 Sim. 211.

(*z*) Coslake v. Till, 1 Russ. 176; Macbryde v. Weekes, 22 Beav. 533.

(*a*) Doloret v. Rothschild, 1 Sim. & Stu. 590.

delay on the other side (*b*). In this case a reasonable time must be given by the notice to perform what is required (*c*).

Contract impossible to be enforced in toto.] Another line of defence is, that the whole of the contract cannot be performed by the Court, which will not perform a contract to build (*d*), to do repairs (*e*), to render personal services (*f*); and if these are parts of the contract, though the defendant may be only required to pay for or convey property, yet if the Court cannot secure to him these parts of the agreement, it will not be performed, as the contract must be performed entirely or not at all (*g*). But if what the vendor agrees to do, as, for example, to do repairs (*h*), or to make a road (*i*), is done before, the stipulation is no objection to his suit for specific performance.

Contract illegal.] Of course an illegal contract will not be performed. There are certain things which are unassignable, such as, the right to bring an action to recover land, on the ground of maintenance (*k*), a portion of the land to be recovered on the ground of champerty (*l*); the pension or pay of public officers (*m*), the income of an ecclesiastical benefice (*n*).

(*b*) Wells v. Maxwell, 33 L. J., N. S. 44.

(*c*) It is seldom that a written contract does not fix a time for completion; this is not of the essence of the contract, and the usual condition, that if from any cause delay in completion shall have taken place interest shall be paid, is often relied upon by the Court as showing the time fixed is not essential.

(*d*) Lucas v. Comerford, 8 B. C. C. 66.

(*e*) Lane v. Newdegate, 10 Ves. 192.

(*f*) Pickering v. Bishop of Ely, 2 Y. & C. C. C. 267.

(*g*) Gervais v. Edwards, 2 Dr. & Warr. 80; Hills v. Croll, 2 Ph. 62.

(*h*) Dyer v. Hargrave, 10 Ves. 505; Hope v. Hope, 22 Beav. 351.

(*i*) Wells v. Maxwell, 33 L. J. N. S. 44.

(*k*) Stone v. Yea, Jac. 326.

(*l*) Wood v. Downes, 18 Ves. 120; Reynell v. Sprye, 1 D. G. M. & G. 660.

(*m*) Ellis v. Earl Grey, 6 Sim. 219; Collyer v. Fullom, Turner & Russ. 468.

(*n*) Hawkins v. Gathercole, 6 D. G. M. & G. 1.

Consideration partly illegal.

If the consideration in a contract of sale be partly legal and partly illegal, as if, on a sale of a goodwill, a sum of money is paid and there is also a contract by the seller not to exercise his calling within the kingdom (which would be illegal as in restraint of trade) (*o*), the contract will not be enforced against the seller unless the purchaser waive the benefit of the contract in this respect, nor will it be enforced against the purchaser at all, as the Court will not perform this stipulation on the part of the seller, and cannot secure the purchaser what he contracted for.

Not only is a contract for an object which is illegal at law incapable of being enforced, but also contracts which are inequitable on account of the character of the persons who enter into them in equity.

Fiduciary vendors.

Trustees are not allowed to sell under depreciating conditions (*p*), or under any circumstances of waste or improvidence (*q*), if the sale is shown to have been at an inadequate price.

Voluntary settlor.

Although a voluntary settlement is by the stat. of 27 Eliz. void against a purchaser, the settler is not allowed to sue for specific performance of a contract to sell the settled land (*r*), though the purchaser may (*s*).

Reference as to title.

Good title not shewn.] In a contract for the sale of real estate, the vendor cannot enforce the contract if he cannot make out a title, but either party may have a reference as to title. Neither party is bound by what they have done in relation to the title before suit. The vendor may show a better title, on the usual reference being made, than he has already shewn, and the purchaser may show objections to the title other than those he has made; of course subject to the special contract.

(*o*) Homer v. Ashford, 3 Bing. 328.
(*p*) White v. Cuddon, 8 Cl. & Fin. 766.
(*q*) Ord v. Noel, 5 Mad 438.
(*r*) Smith v. Garland, 2 Mer. 123.
(*s*) Buckle v. Mitchell, 18 Ves. 100.

The question of title may be so raised by the pleadings as to be decided at the first hearing without a reference.

Title bad.

If a purchaser files a plaint alleging the vendor has no title, his suit should be dismissed with costs (*t*). If he does not allege this, but it turns out that the vendor has no title, the plaint should be dismissed without costs (*u*). A purchaser of a chattel may recover damages for the loss of bargain at law (*x*), but not, as we have seen, a purchaser of land.

Title doubtful

A purchaser cannot be compelled to take what the judge who decides the cause thinks a doubtful title (*y*). It is commonly said that the purchaser cannot be compelled to buy a law suit (*z*), but this means a law suit in which it is not certain that he would succeed; for a notice by an adverse claimant that he will dispute the purchaser's title (*a*) will not, nor will even an actual bill filed against the seller claiming the estate (*b*), in all cases prevent the Court from forcing the title on the purchaser. In a recent case, Lord Romilly, M. R., compelled a purchaser to take a title depending on the validity of a purchase by a solicitor from his client, which he decided was valid (*c*).

Indeed, it is the tendency of modern judges in equity to decide, as judges at law must, whether the title is good or bad (*d*). Judges at law, indeed, will not give damages against a purchaser for breach of contract, it is said, if it is a doubtful question of fact which constitutes the doubt as to

(*t*) Nicolson v. Wodsworth, 2 Sw. 365.
(*u*) Malden v. Fyson, 9 Beav. 347; see *infra*, Costs.
(*x*) Hadley v. Baxendale, 9 Exchequer Reports, 341.
(*y*) Jervoise v. Duke of Northumberland, 1 J. & W. 568.
(*z*) Sharp v. Adcock, 4 Russ. 374.
(*a*) Green v. Pulsford, 2 Beav. 70.
(*b*) Osbaldiston v. Askew, 1 J. & W. 539.
(*c*) Spencer v. Topham, 22 Beav. 573.
(*d*) See a report of Minet v. Lenan, 20 Beav. 269, in 1 Jur N. S. 410, where it is said that the M. R. thought that where the title depended on a question of law it was the duty of the Court to decide it.

he title (*e*); but if it is a doubtful question of aw, even though that be of an equitable cha- racter, they will decide it (*f*), and although their lecision is not binding upon the adverse claimant.

If a purchaser considers the title is doubtful, nd the seller brings an action for the purchase noney, the purchaser is advised by Lord St. Leonards to file a bill for specific performance or a return of his deposit, if a good title cannot be made (*g*).

Special defences.] The special defences are rarely of use in specific performance suits, except when the vendor is plaintiff and the demand is simply a money demand.

Infancy. An infant can neither sue or be sued in equity on a contract (*h*), although he can sue at law upon a contract if for his benefit (*i*); but if an infant represents himself as of full age, and thereby obtains an advantage, he cannot afterwards set up his infancy (*k*).

Bankruptcy. It is to be remembered, however, that the bankruptcy (*l*) or insolvency (*m*) of the plaintiff since the contract is a bar to the suit. A vendor may compel the assignees to elect, whether they will perform the contract or not (*n*). If the contract involve covenants by the purchaser, the assignees must enter into them if they are plaintiffs (*o*), not if they are defendants (*p*).

Evidence.] The nature of the evidence to be

(*e*) Jeakes v. White, 6 Exch. Rep. 873; Simmons v. Haseltine, 28 L. J. N. S. C. P. 129; see obs. of Blackburn, J., in Stevens v. Austin, 30 L. J. Rep. N. S. Q. B. 212, see p. 217.

(*f*) Doe d. Cadwallader v. Price, per Parke, B., 16 M. & W. 603.

(*g*) Sug. V. & P. 13th ed. 332.

(*h*) Flight v. Bolland, 4 Russ. 298.

(*i*) Warwick v. Bruce, 2 Maule & Sel. 205.

(*k*) Wright v. Snowe, 2 D. G. & Sm. 321.

(*l*) Lowes v. Lush, 14 Ves. 547; Franklin v. Lord Brownlow, 14 Ves. 560.

(*m*) Crosbie v Tooke, 1 My. & K. 431.

(*n*) 12 & 13 Vict. c. 106, s. 146.

(*o*) Weatherall v. Geering, 12 Ves. 513.

(*p*) Stephens v. Hotham, 1 K. & J. 571; see Hare v. Burges, 4 K. & J. 45.

adduced in suits for specific performance has been incidentally treated of so as hardly to render any special notice requisite.

As the contracts of which specific performance is sought usually relate to land, the Statute of Frauds requires that the plaintiff's evidence should be in writing, unless he seeks to establish a case of part performance of a parol contract. The plaintiff cannot bring parol evidence of a variation of the contract, unless such parol variation has been partly performed.

The defendant's evidence, however, need not be in writing, as he can show a parol variation or waiver of the contract, and thus prevent the plaintiff from getting the extraordinary, as it is called, assistance of the Court of Equity (*q*).

Sir Hugh Cairns' Act.

The power of the Court to give damages in addition to or in lieu of specific performance, under Sir Hugh Cairns' Act, leads to more parol evidence than was before adduced in specific performance suits.

Decree at hearing.] If the Court decrees specific performance, the decree after a declaration of right to specific performance, directs (*r*), if the sale is of an interest in land, or of anything else which renders such an inquiry proper, as of shares in mining concerns (*s*), an inquiry whether a good title can be made, and when this good title was first shown (*t*).

Inquiry as to title.

Restricted inquiry.

If the contract or conditions under which the purchase was made contain the usual stipulation that all objections not taken within a limited time shall be waived, and the purchaser has made

(*q*) Price v. Salusbury, 32 Beav. 446.

(*r*) The decree should be:—"This Court doth declare, that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution, and decrees the same accordingly; and let the following inquiries be made, that is to say: 1. An inquiry, whether a good title can be made to the said [property]; 2. and in case it shall appear that a good title can be made to the said [property], an inquiry when it was first shown that such good title could be made."

(*s*) Curling v. Flight, 2 Phill. 613.

(*t*) Parr v. Lovegrove, 4 Drew. 170.

requisitions, the inquiry will be as to the title, having regard to the requisitions (*u*). Reference as to title will not be made before decree, unless it is admitted there is no other question in the cause. The requisitions in the abstract must be answered, though there is a power to annul (*v*).

Mode of prosecuting inquiry.

The inquiry as to title proceeds in the registrar's office, on the day fixed by the registrar for proceeding with the inquiry. The registrar is rather in the position of a Master under the old practice in Chancery than a chief clerk under the new; and he must answer the inquiry as to title himself.

The first step is to bring in the abstract. If it has been delivered, and the purchaser is the plaintiff, he brings it in with written objections to the title; and if the vendor is the plaintiff, the purchaser must bring the abstract in with the written objections. If the abstract has not been delivered, the vendor, if plaintiff, must deliver the abstract to the purchaser's solicitor, as soon as the decree has been made. If the purchaser does not bring in the abstract which has been delivered to him within a time to be fixed by the registrar, the vendor may make a new copy of the abstract from his draft and bring it in, and will be allowed the expense as costs in the cause.

The written objections will be argued before the registrar, or he may, as the Master used to do (*w*), have produced before him the written opinions of counsel already given upon the abstract, or he may direct the abstract to be laid before a conveyancer (*x*), upon whose opinion he must exercise his own judgment in certifying to the judge.

Right of vendor to amend the title.

If the inquiry is general, the vendor may bring in a better abstract, and the purchaser take new

(*u*) Saul v. Bolton, L. JJ., 5 Aug. 1852. Seton (Ed. 3rd.), p. 594.

(*v*) Greaves v. Wilson, 25 Beav. 290.

(*w*) Daniell's Ch. Practice, 1st edition, vol. 2, p. 872.

(*x*) The Master's right to do this was sanctioned by Lord Eldon, Flower v. Walker, 1 Russ. 408.

objections, and the vendor has until the registrar's certificate to make out the title. The Court has allowed time to enable the vendor to get an Act of parliament (*y*), or the concurrence of another party (*z*); but in general the Court will not allow the vendor to make a new title unless the purchaser acquiesce (*a*). If he gives notice to rescind the contract as soon as he discovers the objection he is free (*b*).

Good title, what.

The title is said to be "good" when it appears that the vendor can himself convey, or can compel other persons to convey, the legal and equitable estate to the purchaser, and this although such compulsion can only be procured by paying off mortgages exceeding in amount the purchase money (*c*). If he cannot compel an outstanding interest to be got in, the title should be reported against (*d*).

Certificate—motion to vary.] The certificate must answer the inquiry whether the title is good or not.

If the registrar certifies in favour of the title the application to vary the certificate will not, as under the old practice in Chancery on a Masters' report, specify the various objections to the title, but be simply a motion to discharge the certificate (*e*); the Court will, however, notwithstanding the general terms of the application, not allow any other objections to be made to the title than those which have been delivered in the registrar's office (*f*).

Form of notice of motion to vary.

Title certified good.

If the opinion of the Court is against the title, and the vendor alleges that the registrar has, by expressing his opinion that the title as shewn was

(*y*) Lord Stourton v. Meers, cited 2 P. Wms. 630; Devenish v. Brown, 26 L. J. Ch. 23.

(*z*) Sidebotham v. Barrington, 4 Beav. 110.

(*a*) Hoggart v. Scott, 1 R. & M. 293.

(*b*) Forrer v. Nash, 6 N. R. 361.

(*c*) Townsend v. Champernown, 1 Y. & J. 450.

(*d*) Esdaile v. Stephenson, 6 Mad. 366. As to whether the objection should be stated, see Lewis v. Loxham, 1 Mer. 179.

(*e*) Parr v. Lovegrove, 4 Drewry, 140.

(*f*) See Brooke v. ——, 4 Mad. 212.

good, prevented him from giving further proof that the title is good, the course of the Court should seem to be to send it back to the registrar to review his certificate (*g*); but this will throw the costs of the suit if the title should ultimately be proved good, down to the time of such proof, upon the vendor: and if he does not get a reference back when the application to vary is argued, he must pay the costs of a special application (*h*).

Form of certificate.

If the registrar certifies against the title, he ought, it seems, to state the points in which the title is defective (*i*).

The chief clerk sometimes, on an inquiry in chambers as to title, certifies the objections to it and the vendor's answer to these objections; perhaps the Master might have done so under the old practice, if there was liberty to state special circumstances, but it would seem to be the duty of the registrar to answer the inquiry aye or no.

The registrar cannot certify that the title is a doubtful one, but on an application to vary his certificate by either party, if the purchaser contends that the title is doubtful, whether he is supporting a certificate of bad title or opposing a certificate of good title, the Court may decide without either varying or confirming the certificate (*k*) upon the principles to which we have already adverted, that the title is too doubtful to be forced on the purchaser.

New evidence against title.

If the certificate is not disputed or confirmed and is in favour of the title, there can be no further question raised unless some new fact appears by which the title is affected; when if the purchaser applies directly that the new fact is known to him, for a reference back to the registrar, it should be granted (*l*); so if he has been taken by surprise (*m*). It cannot be too often

(*g*) Andrews v. Andrews, 3 Sim. 390.
(*h*) Egerton v. Jones, 3 Sim. 392, 1 Russ. & Mylne, 694.
(*i*) Green v. Monk, 2 Moll. 325.
(*k*) Wilcox v. Bellaers, Turner & Russ. 491.
(*l*) Jeudwine v. Alcock, 1 Mad. 597.
(*m*) Wood v. Lambirth, 9 Sim. 195.

impressed upon the reader that a Court of Equity will not compel a man to take a bad title.

Motion to vary, when heard.

The hearing on further consideration should come on at the same time as an application to vary the certificate; this, which should be the general rule in all suits (*mm*), is especially desirable in suits for specific performance (*n*), and the Court will sometimes, if satisfied of the goodness of the title, although certified against, even when the objection certified is to be cured by a subsequent act, decree in favour of the vendor on the hearing of the application to vary, and on further consideration (*o*).

Final decree.] We shall consider the decree to be made after the inquiry as to title has been answered and the decree, if no inquiry is directed, together.

Form of decree where no inquiry.

If there has been no inquiry, the declaration of right is made as in the first part of the decree directing an inquiry.

It then proceeds as follows:—

1. Let interest be computed at the rate of £ per cent. per annum, on the sum of £ , the balance of the purchase money for the [property] comprised in the said agreement, from the day of when the same ought to have been paid according to the terms of the said agreement.

2. Let an account be taken of the rents and profits of the said estate received by the [vendor, plaintiff, or defendant], or by any other person, by his order or for his use, since the said day of [If costs are given, and the vendor is plaintiff] and tax the plaintiff his costs of this suit; and let what shall be coming on the said account of rents and profits be deducted from the amount [of the balance] of the purchase money and interest, and costs, when so computed [and

(*mm*) Crompton v. Huber, 1 Jur. N. S. 465; Hudson v. Carmichael, 18 Jur. 852.

(*n*) Esdaile v. Stephenson, 6 Mad. 366; see the remarks of Lord St. Leonards, Sug. V. & P. 12th ed. 412.

(*o*) Paton v. Rogers, 6 Mad. 256.

taxed] as aforesaid: and [if the vendor is plaintiff] let, upon the plaintiff's executing a proper conveyance of the said estate to the defendant or to whom he shall appoint; such conveyance to be prepared by the defendant, at his expense, submitted to the plaintiff for approval, and to be settled by the Judge in case the parties differ, and upon the plaintiff's delivering to the defendant, upon oath, all deeds and writings in his custody or power relating to the said [estate], the defendant pay to the plaintiff the balance which shall be certified to remain due to him in respect of such purchase money and interest [and costs] after such deduction is assessed.

Purchaser plaintiff.

If the purchaser is plaintiff, the direction for payment precedes the direction for conveyance, the decree, of course, directing the plaintiff to perform his part of the contract first.

Special declarations.

If the purchaser agrees to accept the title at the first hearing, or if the Court decides that he is bound by the contract to accept the title "without dispute" (*p*), or that he has waived his right to call for the title (*q*), there should be corresponding declarations in the decree.

Special directions or inquiries.

The decree will charge the vendor with an occupation rent, if in actual occupation, but not for rents which, but for his wilful default, he might have received, unless a case is made by the pleadings and proved, of wilful default on his part (*r*). Sometimes an inquiry is directed when this case is only partially proved (*s*). He will probably be allowed for repairs, if necessary for the preservation of the property, under "just allowances," but he will probably not be allowed for improvements, though of a permanent character, unless this is specially directed by the decree, which will not contain such a special direction unless a case is made for it (*r*).

(*p*) Duke v. Barnett, 2 Coll. 242.
(*q*) Simpson v. Sadd, 4 D. G. M. & G. 673.
(*r*) Sherwin v. Shakspear, 5 D. G. M. & G. 517.
(*s*) Acland v. Gasford, 2 Mad. 28; as to the general rules on the subject of inquiries, see *supra*, p. 15.

Interest.

The purchaser pays interest from the day fixed for completion: if no time is fixed, from the time he is let into possession (*t*).

Conditions as to interest.

It is a common condition of sale, that "if from any cause whatever" the purchase shall not be completed by the day fixed, the purchaser shall pay interest. "Lord St. Leonards has laid down, and the cases (*u*) have all settled, that the words '*if from any cause whatsoever*,' are to be read, 'if from any cause whatsoever other than the wilful default of the vendor'" (*v*).

If this condition is not inserted, the purchaser is only liable for interest from the time when he could safely have taken possession, that is, when a good title was shewn (*w*), and then the rate of interest will be £4 per cent. (*x*).

Of course, for the period during which interest is payable, the purchaser will be entitled to the rents, if out of possession.

Purchase money lying idle.

If the purchaser takes possession, and appropriates the purchase money, and gives notice to the vendor that it is lying idle, he will not be bound to pay interest in the absence of any special stipulation, if the delay in completing is on the vendor's part (*y*), and a vendor not completing after the price was fixed by arbitration, no time being specially named for completion, and the purchasers giving notice that their money was lying idle, they were allowed the rents from the date of the award, but the vendor was allowed no interest (*z*).

If, according to the agreement, the purchaser ought to have taken possession, the vendor will not be charged an occupation rent (*a*).

(*t*) *Ex parte* Manning, 2 P. W. 410.
(*u*) Sherwin v. Shakspear, 5 D. G. M. & G. 517; Vickers v. Hand, 26 Beav. 630.
(*v*) Lord Palmerston v. Turner, 33 L. J. N. S. Ch. 457.
(*w*) Wells v. Maxwell (No. 2), 32 Beav. 550.
(*x*) Esdaile v. Stephenson, 1 Sim. & Stu. 122.
(*y*) Howland v. Morris, 1 Cox, 59; Dyson v. Hornby, 4 D. G. & S. 481.
(*z*) Regent's Canal Company v. Ware, 23 Beav. 575.
(*a*) Dakin v. Cope, 2 Russ. 173.

If the Court has decided that compensation in the shape of an abatement from the purchase money is to be made to the purchaser, the decree will direct an inquiry what deduction ought to be made from the purchase money in respect thereof. Such compensation may be for deterioration in the estate through the vendor's mismanagement (*b*); but not if the deterioration took place after the time fixed for completion, and the purchaser could have safely taken possession (*c*); or for a deficiency in the quantity (*d*) stated, or in the character of the property, as of a house being in good repair (*e*); or for a defect in title, as if there is a right to dig for mines (*f*); or for an incumbrance, as a liability to repair a chancel (*g*). Inquiry as to compensation.

Conveyance.] The conveyance is settled by the judge, if the draft sent by the purchaser to the vendor is not approved of, unless the purchaser approves of the alterations in the draft made by the vendor. The registrar would in practice merely consider those parts of the draft where the parties disagree, and he would certify to the judge his approval of the draft as in his opinion it ought to be settled, and the approval of the judge will be signified by a memorandum written on the margin of the engrossment.

If the point is one of difficulty, the judge will make an order referring it to a conveyancing counsel by name to settle it. Order V., r. 4.

If a mortgagor sells, free from incumbrance, the purchaser is entitled, with the mortgagee's concurrence, and saving the vendor all liability and extra expenses, to a conveyance so as to keep the mortgage on foot (*h*).

Delivery of deeds.] Although the usual direction as to delivery of deeds is to deliver up all,

(*b*) Foster v. Deacon, 3 Mad. 394.
(*c*) Minchin v. Norval, 4 Beav. 332.
(*d*) Hill v. Buckley, 17 Ves. 394.
(*e*) Dyer v. Hargrave, 10 Ves. 505.
(*f*) Seaman v. Vaudry, 16 Ves. 390.
(*g*) Forteblow v. Shirley, 2 Sw. 223.
(*h*) Cooper v. Cartwright, John. 679.

this will of course be omitted when the vendor retains a larger part of the property to which they relate than the purchaser buys. The right extends to all deeds and other muniments of title, however ancient, in the power of the vendor (*i*).

Dismissal of bill.] If the Court does not think that a specific performance ought to be granted, or if upon an inquiry as to title the title is found bad, the bill is dismissed.

Dismissal without prejudice to action.

The bill by vendor was dismissed without prejudice to any action, it being so asked by plaintiff (*k*). So a bill by purchaser (*l*). This seems to be more important since Mr. Rolt's Act, as, the Court being bound to decide the legal as well as the equitable rights of parties to suits, a dismissal might perhaps be a bar to an action (*m*).

Return of deposit.

If the vendor who has received the deposit files his bill, and it is dismissed, he may be ordered to return the deposit with interest (*n*) at 4 per cent.

If the purchaser is plaintiff, and his bill is dismissed, the defendant cannot be ordered to pay back the deposit (*o*). The purchaser's remedy is at law; but when the agreement for sale contained a clause that the deposit was to be repaid with interest, Lord Redesdale, refusing a specific performance of the rest of the agreement at the suit of the purchaser, granted that part of the relief, and decreed a return of the deposit with costs (*p*). And Lord Justice Knight Bruce, when V. C., refused the vendor his costs when, the purchaser's bill being dismissed, the vendor declined to return the deposit (*q*).

Interlocutory applications.] There are several

(*i*) Smith v. Chichester, 2 Dr. & Warren, 393.
(*k*) Benson v. Lamb, 9 Beav. 507.
(*l*) Wood v. Scarth, 2 K. & J. 33.
(*m*) Robson v. Whittingham, L. JJ., 17 Jan. 1866.
(*n*) Anson v. Hodges, 5 Sim. 227; Webb v. Kirby, 7 D. G. M. & G. 376.
(*o*) Williams v. Edwards, 2 Sim. 78; Kendall v. Beckett, 2 Russ. & M. 88.
(*p*) Clinan v. Cooke, 1 Sch. & Lef. 22, see p. 43.
(*q*) Gee v. Pearse, 2 D. G. & S. 346, see *supra*, p. 219.

forms of interlocutory applications in suits for specific performance, upon each of which we shall say a few words.

Injunction.] If the purchaser bring an action for the deposit, or for the expenses he has been put to, the Court will, upon a bill filed by the vendor, grant an injunction against the action for the deposit, upon that being brought into Court (*r*); and this when the action is brought either against the vendor or his auctioneer (*s*). And the Court will restrain proceeding upon the action for the expenses upon the plaintiff giving judgment to be dealt with as the Court should direct (*t*). Restraining action.

The property sold will be preserved *in statu quo* pending the suit. If the purchaser is in possession, he may be restrained from felling timber (*u*). So a vendor will be restrained from presenting, and the bishop from instituting, or in the case of a lapse from collating to the living, any clerk not named by the purchaser of the next presentation (*v*); and a vendor would probably be restrained from cutting timber. He will be restrained from conveying away the legal estate (*w*). Special injunctions.

Receiver.] When the purchaser was partly in possession, and admitted his embarrassment, and had paid a deposit, the Court, upon a bill by the vendor, upon the mutual lien of the vendor for the remainder of the purchase money and of the

(*r*) Tanner v. Smith, 4 Jur. 310; Annesley v. Muggeridge, 1 Madd. 593.

(*s*) Sug. V. & P. 13th ed. p. 192, n.

(*t*) Wells v. Maxwell, 32 Beav. 550, not reported on this point; Duke of Beaufort v. Glynn, 3 Sm. & Giff. 213.

(*u*) Crockford v. Alexander, 15 Ves. 138.

(*v*) Nicholson v. Knapp, 9 Sim. 326; see Greenslade v. Dare, 17 Beav. 502.

(*w*) Echliff v. Baldwin, 16 Ves. 267; Turner v. Wight, 4 Beav. 40; Powell v. Wright, 7 Beav, 444; see obs. of Lord Cottenham, in Great Western Railway Company v. Birmingham and Oxford Railway Company, 2 Phill. 602, and of Lord Cranworth in Shrewsbury and Chester Railway Company v. Shrewsbury and Birmingham Railway Company, 1 Sim. N. S. S. 410.

purchaser for the deposit, granted a receiver (*x*). So where the property consisted of buildings and offices, on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention, the Court, on the application of the vendor, the plaintiff, appointed a receiver (*y*).

Payment into Court.] When the purchaser has entered into possession contrary to the intention of the parties, or has been a long time in possession, he will be ordered on motion to elect either to give up possession or to pay the purchase money into Court (*z*). If he in possession under the contract, or without any such authority, exercises acts of ownership (*a*) tending to alter the nature of the property, or attempts to sell it, he will be ordered, on motion, to pay the purchase money into Court peremptorily (*b*).

The acts upon which this order has been made are:—erecting new and pulling down old buildings; planting a new orchard; throwing two meadows or fields into one; making a new garden; cutting down timber: underletting the premises; changing the tenants (*c*).

Ne exeat regno.] A writ of *ne exeat regno* lies in Chancery against a purchaser upon his intention to go abroad (*d*). If he has accepted the title (*e*), or there has been a decree for specific performance after the title has been established (*f*), the County Court will probably be entitled to make orders of a similar character (*g*).

Costs.] Costs in suits for specific performance

(*x*) Hall v. Jenkinson, 2 V. & B. 125.
(*y*) Boehm v. Wood, 2 Jac. & W. 236.
(*z*) Clarke v. Wilson, 15 Ves. 317; Morgan v. Shaw, 2 Mer. 158.
(*a*) Cutler v. Simons, 2 Mer. 103.
(*b*) Brown v. Kelty, 1816; Sug. V. & P. 13th ed. 193.
(*c*) Cutler v. Simons (*loc. cit.*); Osborne v. Harvey, 1 Y. & C. C. C. 116.
(*d*) Boehm v. Wood, T. & R. 332; Stewart v. Graham, 19 Ves. 313.
(*e*) Jackson v. Petrie, 10 Ves. 164.
(*f*) Raynes v. Wyse, 2 Mer. 472.
(*g*) See General Part, *supra*, p. 31.

may be divided into two classes. 1. Those in which the dispute is about the contract. 2. Those in which the dispute is about the title. Both these classes of costs may be involved in the same suit.

Question of contract.

Generally, if a plaintiff files a bill for specific performance of a contract of sale, and the defendant insists that the plaintiff is not entitled to a decree, on other grounds than those of title, if the decree is made it will be made with costs against the defendant down to the hearing; as, for example, where the defendant insisted that the contract had been abandoned (*h*).

Plaint dismissed without costs.

If the plaintiff's suit for specific performance is dismissed, even when the title is not in dispute, it is not always with costs. Where there has been a mutual misunderstanding, the bill was dismissed without costs (*i*). So where parol evidence of mistake or suspense, not occasioned by the plaintiff, prevents a decree (*k*). A bill for specific performance with parol variations, left out by the fraud of the defendant, was dismissed without costs (*l*). So where it was dismissed on account of the laches of the plaintiff (*m*).

An agreement difficult to construe will prevent the Court from giving the costs to the party suing, and suing successfully, on it (*n*).

Compensation.

Where a plaint is filed for specific performance with compensation, and specific performance is decreed without compensation, the plaintiff must pay the costs (*o*).

Death of vendor.

When a suit is necessary in consequence of the vendor dying intestate, leaving an infant heir (*p*),

(*h*) Taylor v. Brown, 2 Beav. 180.
(*i*) Stratford v. Bosworth, 2 V. & B. 341.
(*k*) Townshend v. Stangroom, 6 Ves. 328; Wood v. Scarth, 2 K. & J. 33.
(*l*) Woollam v. Hearn, 7 Ves. 211.
(*m*) Guest v. Homfray, 5 Ves. 824; Firth v. Greenwood, 1 Jur. N. S. 866.
(*n*) Deller v. Simonds, 5 Jur. N. S. 997; Reade v. Bentley, 27 L. J., Ch. 254.
(*o*) Fewster v. Turner, 6 Jur. 144; Earl of Durham v. Legard, 34 L. J. Ch. 589.
(*p*) Armitage v. Askham, 1 Jur. N. S. 227.

Vendor.

or having before the contract devised the estate to an infant (*q*), the decree is made without costs, as between purchaser and personal representative of vendor; but the costs of the heir will be paid, as between solicitor and client, out of the purchase money (*r*).

Question of title.

When the specific performance is disputed on the ground of an objection to the title, the costs do not so habitually follow the result as in other cases. A vendor filing a bill for specific performance, and succeeding in compelling the purchaser to take the title, gets his decree generally with costs, if a good title was shewn before suit and the Court considers the objection to the title clearly untenable, though the purchaser have counsel's opinion in his favour (*s*); and Lord Eldon used to think it helped the purchaser's title to make him pay the costs (*t*).

Time of shewing title.

If the title is not shewn till after bill filed, the vendor pays costs down to the time when the title is first shewn (*u*); and the subsequent costs, if the purchaser takes no step inconsistent with the finding in Chambers, will be paid by the vendor (*v*).

Title bad.

If the vendor fails for want of title, and the title is clearly bad, the bill is dismissed with costs (*w*); but the failure for want of title of vendor's suit is only a *primâ facie* case for costs (*x*). Generally, if the Court thinks the title doubtful, and *therefore* refuses to force it on the purchaser, it dismisses the vendor's bill without costs (*y*).

Title doubtful.

Plaint by purchaser where title bad.

If the purchaser files his bill, and it turns out that the vendor cannot make a good title, the

(*q*) London and South Western Railway Company v. Bridger, 4 N. R. 261.
(*r*) Barker v. Venables, 34 L. J. N. S. Ch. 420.
(*s*) Maling v. Hill, 1 Cox. 186.
(*t*) McQueen v. Farquhar, 11 Ves. 467.
(*u*) Freer v. Hesse, 4 D. G. M. & G. 497; Wilson v. Williams, 3 Jur. N. S. 810.
(*v*) Annesley v. Muggeridge, 1 Madd. 593.
(*w*) Vancouver v. Bliss, 11 Ves. 463.
(*x*) Edwards v. Harvey, Coop. 40.
(*y*) White v. Foljambe. 11 Ves. 337; Wilcox v. Bellaers, T. & R. 491.

practice is to dismiss the bill without costs (*z*). In *Malden* v. *Fyson* the bill was dismissed without costs, and without prejudice to any action at law. An action was brought (*a*), and it was then held at law that the costs of one suit in equity could not be given as damages, "it having been assumed," says V. C. Wood (*b*), "that the Court of Equity would have dealt effectively with the costs, and that therefore the matter must be taken to have been disposed of."

It is desirable, therefore, when the bill is dismissed without costs, and without prejudice to an action at law, to expressly state that it is without prejudice to including the costs of the suit in equity in the action (*c*). Of course, costs in specific performance suits are subject to the general rules as to costs (*d*).

(*z*) Malden v. Fyson, 9 Beav. 347.
(*a*) 11 Q. B. 292.
(*b*) Onions v. Cohen, 2 H. & M. 354, see p. 363.
(*c*) Wood v. Scarth, 2 K. & J. 33.
(*d*) See *supra*, pp. 38, 40; particularly see Hood v. Oglander, (*loc. cit.*)

CHAPTER V.

CANCELLATION OF AGREEMENTS.

Jurisdiction 234
In what Cases an Agreement will be Cancelled . . . 234
Agreement Cancelled on the ground of fraud . . . 239
Actual Fraud . . . 240
Suggestio falsi . . . 240
Suppressio veri . . . 244
Constructive Fraud . . 246
Presumed Fraud . . . 248
Collateral Fraud . . . 250
Delay of Purchaser . . . 253
Want of Title 253
Contract set aside on ground of Consequential Relief . . 254
Form of Plaint . . . 256
Defences 256
Evidence 260
Decree 260
Costs 261
Injunction and Receiver . . 262

Jurisdiction.] The 28 & 29 Vict. c. 99, s. 1, confers upon the County Courts all the power and authority of the High Court of Chancery in all suits for the delivering up or cancelling any agreement for the sale or purchase of any property where the purchase money does not exceed the sum of £500 (*a*), and in all proceedings for orders in the nature of injunctions where the same, were requisite for granting [complete] relief in such suits (*b*).

The judge of the County Court has in such suits, in addition to his former powers and authorities, all the powers and authorities for the purposes of the Act of a judge of the High Court of Chancery.

Forum.

The suit may be instituted in any Court within the district of which one of the defendants resides or carries on business (*c*).

The mode of proceeding is by plaint (*d*).

Equity will cancel an instrument,

In what cases an agreement will be cancelled.] The jurisdiction to decree the delivery up of in-

(*a*) Clause 4.
(*b*) Clause 8.
(*c*) 28 & 29 Vict. c. 99, s. 10, cl. 5; see *supra*, p. 18.
(*d*) Order I., r. 1.

struments is peculiar to Courts of Equity. A Court of law can only refuse to give any relief upon them when sought to be enforced: thus a forged instrument may be decreed to be delivered up to be cancelled (*e*).

The jurisdiction is exercised in the case of agreements which, if sued upon at law, would be declared void, and also in the case of agreements which would be held valid at law but void in equity.

The foundation of the jurisdiction is generally one of the three following grounds.

1. That the agreement may be used at law or in equity against the party who comes to have it cancelled, when his evidence to defend himself may by lapse of time be lost (*f*). 1. where evidence may be lost.

2. That the agreement may be sued on at law, though invalid in equity, and that Courts of Equity should interfere to prevent the possibility of its being so used (*g*). 2. where plaintiff may be unjustly vexed at law.

3. That though the agreement is invalid at law, and lapse of time will not affect the evidence of its invalidity, yet there is relief to be given in equity consequential on its being set aside, such as the taking accounts, the repayment of money paid, and the placing the parties in the same position as if the agreement had not been executed (*f*). 3. where consequential relief is sought.

A Court of Equity has concurrent jurisdiction with a Court of law in ordering money to be repaid which has been obtained by fraud (*h*).

The jurisdiction is not confined to agreements for the sale of property which would be specifically performed by the Court; for the Court decrees the cancellation of agreements for the sale of chattels, which agreements it would not specifically perform: as in the case of a sale of iron (*i*), and of Agreement need not be such as would be enforced specifically.

(*e*) Peake v. Highfield, 1 Russ. 559.
(*f*) Simpson v. Howden, 3 M. & Cr. 97; see p. 102.
(*g*) Willan v. Willan, 16 Ves. 72.
(*h*) Colt v. Wollaston, 2 P. W. 156; Blair v. Bromley, 2 Phillips, 354.
(*i*) Wilson v. Short, 6 Hare, 366.

shares in a coaching business (*k*), where the Court could only have enforced the execution of a deed of copartnership if it had been specially agreed for (*l*).

Jurisdiction of County Courts.

The jurisdiction of the County Courts is limited to the cancelling agreements for sale; if they are executed by deeds of conveyance the County Court has no jurisdiction unless they are only partially executed.

There is a great difference between setting aside a conveyance which binds the party absolutely to part with an estate, and setting aside a contract for buying the estate; in the latter case it is only to prevent the seller from bringing an action at law on the contract (*m*).

There is no part of the jurisdiction of a Court of Equity which requires to be executed with more caution than that of rescinding a contract (*n*). But although the rules on which the Court acts are difficult to extract from the decisions, we think there are some of undoubted application, and it would be a disgrace to the law if it were not so.

Agreement void at law.

Generally, we may say, if the contract is void at law, it will be decreed to be rescinded, unless its invalidity appears on the face of it or is being determined at law.

Mistake.

If the contract is void at law on account of a mistake common to both parties on an essential part of the contract, it will be rescinded, and by a Court of Equity (*o*), as there is very great difficulty in a Court of law in letting in parol evidence, unless some fraud could be proved to shew that parties did not mean what is expressed in their written contract (*p*).

(*k*) Maddeford v. Austwick, 1 Sim. 89.

(*l*) England v. Curling, 8 Beav. 129.

(*m*) Per Lord Alvanley, M. R., Day v. Newman, 2 Cox. 77, see p. 80.

(*n*) Per Lord St. Leonards, on the Law of Property, 598.

(*o*) Calverley v. Williams, 1 Ves. Jun. 210; Stapylton v. Scott, 13 Ves. 427.

(*p*) Haynes v. Hare, 1 H. Blackstone, 664; Pickering v. Dowson, 4 Taunt. 779.

When a Court of Equity considers that the true construction of the agreement is a surprise upon both parties, who have entered into it without due deliberation, though there may perhaps be no mistake available at law as a defence to an action upon it, the agreement will be set aside altogether (*q*). Mistake on both sides.

When an agreement was made for the sale of an estate to the plaintiff by defendant, who brought an ejectment for it, and it turned out that it was the plaintiff's own estate, on a bill filed to have the purchase money refunded, it was decreed with costs, for though no fraud appeared yet there was a plain mistake (*r*). When the particulars of sale described the subject of the sale as the interest, if any, of F. N. The vendor did not consider it worth anything; the purchaser purchased with the possibility of the interest being worth nothing, but he did not purchase it with the certainty of its being worth nothing, as the vendor knew it to be; the vendor was guilty of no fraud, but he ought to have stated that the property was of no value; and V.C. Wood made a decree declaring that the sale was void; that the agreement ought to be delivered up to be cancelled; and the money paid returned, with interest from the time of demand, and costs (*s*).

Where the mistake is that of one party only, although that may be an answer to a bill against him for specific performance, yet if it was not brought about by the other party, it is no ground for the mistaken party's getting the contract rescinded (*t*). Mistake on one side only.

When a contract is void at law on account of Illegal agreement.

(*q*) Willan v. Willan, 16 Ves. 72. This is an authority for this proposition, although Lord Redesdale rested his affirmance of the decision on the advantage taken of the infirm state of one party, 2 Dow. 275; Price v. Ley, 32 L. J. Ch. 530; Lawton v. Campion, 18 Beav. 97.

(*r*) Bingham v. Bingham, 1 Ves. Sen. 126.

(*s*) Smith v. Harrison, 26 L. J. N. S. Ch. 413.

(*t*) Stapylton v. Scott, 13 Ves. 427; Wood v. Scarth, 2 K. & J. 33

its illegality, it will be directed to be cancelled, if the illegality arises from its violating a rule of public policy (*u*). It is settled that, if a transaction be objectionable on grounds of public policy, the parties to it may be relieved, the relief not being given for their sake, but for that of the public (*v*). The decision of a Court of law, that upon grounds of policy or for other reasons an action will not lie on the contract, does not destroy the jurisdiction of a Court of Equity. If it is void at law, the Court will order it to be delivered up (*w*).

If the contract is illegal, but not upon grounds of public policy, the Court will not interfere, but leave the parties to law, upon the maxim "*in pari delicto melior est conditio possidentis*," unless the degree of guilt of the plaintiff is less than that of the defendant (*x*).

Failure of consideration.

A contract entered into by one party on the faith that others would execute it, and not being executed by them, as, for instance, an agreement by A. and B. to buy of C., each jointly and severally bound, but executed only by B., would be decreed to be delivered up at B.'s instance (*y*).

Hard bargain.

A hard bargain, though it will not be enforced by the Court, will not be set aside on that ground alone (*z*). Supposing it to be, in fact, a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can prove fraud on the party contracting with him, or some undue means made use of to draw him into such an agreement (*y*). The remedy at law is left

(*u*) Reynell v. Sprye, 1 D. G. M. & G.

(*v*) Per Lord Eldon, Vauxhall Bridge Company v. Spencer, Jacob, 67.

(*w*) St. John v. St. John, 11 Ves. 526; see p. 535.

(*x*) Osborne v. Williams, 18 Ves. 379.

(*y*) *Re* Carew, 7 D. M. & G. 43, see p. 52; Costigan v. Hastler, 2 Sch. & Lef. 160; as to the effect of Cumberlege v. Lawson, 1 Com. B. Rep. N. S. 709.

(*z*) Green v. Wood, 2 Vern. 632.

(*y*) Per Lord Hardwicke, Willis v. Jernegan, 2 Atk. 252; Kien v. Stukely, 5 B. P. C. 191.

open to the other party if he has been guilty of no misconduct.

It is not sufficient to set aside an agreement that the party was drunk at the time of its being signed (*z*). A Court of Equity ought not to give its assistance to a person to get rid of any agreement, merely on the ground of his having been intoxicated at the time (*a*). If there was any unfair advantage taken of his situation (*b*), or any contrivance or management to draw him into drink (*c*), he ought to be relieved in a Court of Equity (*d*). But the Court will not decree specific performance of an agreement made in a state of intoxication by the defendant, though the plaintiff had not contributed to make the defendant drunk, or taken any advantage of his situation (*e*). Drunkenness.

A Court of Equity will not interfere to set aside a contract overreached by an inquisition in lunacy, if fair and without notice, and where the parties cannot be reinstated (*f*); but if it was a contract for a purchase not completed, and in which it is possible to replace the parties, it might be done (*g*). Lunacy.

Agreement cancelled on the ground of fraud.] The more common ground for rescinding contracts which are void at law, is when they are void on the ground of fraud practised on the party complaining by the other.

"I apprehend," says Lord Cranworth, C., "that the jurisdiction of this Court to set aside a contract on the ground of fraud is clear, and that it will always be exercised when the Court is satisfied that a person who has bound himself has been induced so to do by the fraud or con-

(*z*) Cory v. Cory, 1 Ves. Sen. 19.
(*a*) Cooke v. Clayworth, 18 Ves. 12; Nagle v. Baylor, 3 Dr. & W. 65.
(*b*) Cory v. Cory, (*loc. cit.*)
(*c*) Johnson v. Medlicott, 3 P. W. 130 (n).
(*d*) Butler v. Mulvihill, 1 Bligh, 137.
(*e*) Cragg v. Holme, at the Rolls, May, 1811, 18 Ves. 14 (n).
(*f*) Niell v. Morley, 9 Ves. 478.
(*g*) See 9 Ves. 482, per Sir William Grant; see *supra*, p. 194.

trivance of the other party, and this will be done although there may be a concurrent jurisdiction at law. It is a most useful head of jurisdiction in equity. There may indeed be cases, short of what I have mentioned, where, without any fraud being committed, a party has been induced to sign something which he ought not to have signed, and in which the Court will be neuter" (*h*).

Different kinds of fraud.

Lord Hardwicke's enumeration of the various species of fraud has been justly approved of by succeeding judges. 1. Actual fraud, arising from facts and circumstances of imposition. 2. Constructive fraud, from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscious bargains. Of these the common law takes notice. 3. Presumed fraud, from the circumstances and condition of the parties contracting, where any advantage is taken by one of the weakness or necessity of another. 4. Collateral fraud, where it is an imposition and deceit on persons not parties to the fraudulent agreement (*i*). The first two constituting fraud at law, and the latter two in equity only.

Actual fraud.] This is deceiving the party, and thereby inducing him to enter into the contract by misrepresentations, *suggestio falsi;* or by concealment of what the party deceiving is bound to disclose, *suppressio veri.*

Misrepresentation,

Suggestio falsi.] Misrepresentation, we have stated (*k*), amounts to fraud, when the statement is untrue, made, in relation to and before the contract, by a party knowing it to be untrue, or with an intention thereby to induce the other party to enter into the contract.

If the statement is false to the knowledge of the party, and material to the contract, an action

(*h*) Bartlett v. Salmon, 6 D. J. M. & G. 33; see p. 40.
(*i*) Earl of Chesterfield v. Jansseu, 2 Ves. 155.
(*k*) *Supra*, p. 214.

of deceit will lie against him at law; and Lord Lyndhurst seems to have thought that it was only when an action of deceit would lie at law that a contract could be set aside on the ground of misrepresentations, in equity (*l*). Lord Brougham stated—1. That the representation must be contrary to the fact. 2. That the party making it must know it to be contrary to the fact. 3. That this false representation must give rise to the contracting of the other party (*m*).

Must be *locum dans contractui.*

If any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person under a mistake upon the terms of bargain, it is a fraud; it misleads the parties contracting on the subject of the contract (*n*).

Sometimes the misrepresentations are by the purchaser: thus when the purchaser represented to the vendor that he was the agent of a friend of the vendor's, and thereby induced the vendor to sign an agreement to sell to him, the agreement was set aside with costs (*o*).

A life policy of assurance is a purchase of a sum payable on the death of a particular person in consideration of either annual payments or one payment: a marine policy of insurance is a purchase by the payment of one sum of another payable on the loss of a vessel. It might perhaps be held that these are within the jurisdiction of the County Court; at all events the rules laid down as to delivering them up are applicable. When a policy is obtained from the plaintiff by means of fraudulent representations as to the habits and conduct of the assured, it may be decreed to be delivered up in the lifetime of the assured (*p*).

Policies of life and marine assurance.

(*l*) Small v. Attwood, Younge, 461; Attwood v. Small, 6 Cl. & Finn. 330.

(*m*) 6 Cl. & Finn. 444.

(*n*) Per Lord Thurlow, Neville v. Wilkinson, 1 B. C. C. 545.

(*o*) Garrick's Case, Sug. V. & P. 11th Ed., p. 244; see Scott v. Langstaffe, Lofft, 797, and Nelthorpe v. Holgate, 1 Coll. 253.

(*p*) Fenn v. Craig, 3 Y. & C. Exch. 215. The principle is approved of by Lord Eldon in Bromley v. Holland, 7 Ves. 20, 21.

If one party makes a representation which he knows to be false, the falsehood of which the other party had no sufficient (*q*) means of knowing, the Court will rescind the contract (*r*). The representation may be by means of experiments, conducted so as to deceive the purchaser, and an agreement obtained in this manner for the sale of a license to use a patent was set aside with costs (*s*).

Misrepresentation not known to be false.

Although the representation is not known to be false by the party making it, yet, if it is false and deceives the other, it makes the agreement void in equity, and sometimes at law. Lord Mansfield said, "there may be many cases where the assertion of a false fact, though unknown to be false by the party making the assertion, will be fraudulent" (*t*). Thus, where a representation was made by the attorney of the vendor that the rent of a house sold was £100 free from rates and taxes, which representation was false in fact though not to the knowledge of the attorney, the contract was held void (*u*). In general, at law, the purchaser cannot recover in an action of deceit, unless he prove that the false representation was, if not false to the knowlege of the party making it, made to induce another to act on the faith of it and alter his position to his damage (*v*).

Prospectus of company.

A contract for the taking shares in a company is a contract of purchase, and the prospectus and advertisements issued by the directors are representations giving occasion to the contract. If those representations are false the contract will be rescinded, and any money repaid (*w*). The circumstance whether they are false to the know-

(*q*) Conybeare v. New Brunswick Company, 1 D. G. F. & Jones, 595, per L. J. Turner.

(*r*) Edwards v. McLeay, 2 Swanst. 287, per Lord Eldon.

(*s*) Lovell v. Hicks, 2 Y. & C. Exch. 46.

(*t*) Bree v. Holbech, 1 Doug. 654; see observations of Lord Cranworth, West v. Jones, 1 Sim. N. S. 288.

(*u*) Early v. Garrett, 3 Ad. & Ellis, N. S. 58.

(*v*) Thorn v. Bigland, 8 Exch. Rep. 745.

(*w*) Conybeare v. New Brunswick Company, 1 D. G. F. & Jones, 578; reversed on appeal, 9 H. L. 711.

edge of the party making them, was not considered of importance, unless he could shew that he believed it to be true, and that he had reasonable grounds for such belief (*x*). At the same time it is not to be understood that if the party who makes the false representation were himself deceived the contract would not be set aside, it would come then within the principle of a common mistake.

The true principle is, that if upon a treaty for purchase one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he cannot be heard to say that he knew nothing of the truth or falsehood of that which he represented (*y*). He is concluded from averring against the other party a different state of things (*z*).

Remedy in cases of misrepresentation.

If the representation be one that can be made good, the purchaser may, if it is material, insist upon its being made good, or upon avoiding the contract (*a*); but the vendor cannot insist that its being made good shall be sufficient relief to the purchaser (*b*), unless it is of an unessential character.

If the representation made be one which cannot be made good, the person deceived shall be at liberty to avoid the contract. Thus, if a man misrepresent the tenure or situation of an estate, as if he sells an estate as freehold which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when in truth it is several miles distant, such a misrepresentation, as it cannot be made true, would, at the option of the party deceived,

(*x*) Pulsford v. Richards, 17 Beav. 87; Jennings v. Broughton, 17 Beav. 234, 5 D. G. M. & G. 126.

(*y*) Rawlins v. Wickham, 3 D. G. & Jones, 304; see p. 317, per L. J. Turner.

(*z*) Per Lord Denman, C. J. Pickard v. Sears, 6 Ad. & Ell. 469; see p. 474.

(*a*) Pulsford v. Richards (*loc. cit.*)

(*b*) Rawlins v. Wickham (*loc. cit.*)

annul the contract (*c*). So if the estate is described as being in a ring fence (*cc*).

A Court of Equity will direct a contract to be rescinded which has been misdescribed in the particulars of sale. A house described as No. 58, Pall Mall, which was in fact a house at the back of No. 37, Pall Mall, and having no windows or frontage towards Pall Mall, was held to be so misdescribed as to entitle a purchaser, immediately on the objection being known, to file a bill to rescind the contract, and for a return of the deposit (*d*). But where an advertisement described a property as an estate, total rental £131. 6*s*. per annum, lease about 75 years, at a moderate ground rent (£50 a year), price 420 guineas, and the purchaser was induced to sign an agreement for an underlease, although V. C. Wood decreed the agreement to be rescinded with costs, the Lord Chancellor, on appeal, dismissed the bill without costs (*e*). Statements that a house is in good repair, or land in good cultivation, are not, when untrue, grounds for rescinding the contract, but only for compensation (*f*).

Suppressio veri.] When it is the duty of a party to the contract to disclose the truth to the other party, a concealment of it is a fraud. In the case of a contract for insurance on life or property, everything is bound to be disclosed material to the contract. When this is not done, the contract is void at law (*g*), and will be set aside in equity on the ground of fraudulent concealment (*h*).

Duties of a vendor.

It is often the duty of the vendor of property

(*c*) Pulsford v. Richards (*loc. cit.*).

(*cc*) Hargrave v. Dyer, 10 Ves. 505.

(*d*) Stanton v. Tattersall, 1 Sm. & Giff. 530. It is stated that in White v. Bradshaw, 17 Dec. 1851, V. C. Parker compelled a purchaser to take a house sold as No. 39, Regency Square, Brighton, though it was situated out of the square.

(*e*) Bartlett v. Salmon, 6 D. G. M. & G. 33.

(*f*) Hargrave v. Dyer, 10 Ves. 505.

(*g*) Carter v. Boehm, 3 Burr. 1910; Lindenau v. Desborough, 8 B. & C. 586.

(*h*) De Costa v. Scandrett, 2 P. W. 169.

o state circumstances affecting it. A vendor oes not often in his agreement recite or repre- ent that he is seised in fee; but if he is aware hat as to any part of the property which he is elling he has not a good title, he ought to dis- lose this and not conceal it. When parties sold house and a coach house and stables, which oach house and stables were built on an en- roachment from Clapham Common, and they llowed the purchaser to complete without dis- losing the state of the title, the conveyance was et aside. Sir W. Grant said, that if a vendor nows and conceals a fact, material to the vali- ity of the title, relief is to be afforded to the urchaser (*i*). This was applied by V. C. Knight Bruce to a vendor's agent concealing the exist- nce of a right of way over the property (*k*), but he House of Lords reversed the decree on the round of the vendor's ignorance, and that the gent had only constructive and not actual notice f the existence of the right of way (*l*). It must e remembered that these were cases of setting side conveyances and not contracts merely.

When a purchaser concealed from the vendors, who were assignees of a bankrupt selling a rever- ionary interest in personal property belonging to he bankrupt's wife, the fact that she was dead, which doubled the value of the property, the con- ract was set aside (*m*). In *Maddeford* v. *Austwick* Sir John Leach, V. C., set aside an agreement where the defendant had dealt with the plaintiff or his share of the profits of their partnership oncerns, without putting him into possession of ll the information which he himself had from he accounts, and when the defendant must have nown, from those accounts kept in his sole pos- ession, that the sum agreed to be paid was not n adequate consideration (*n*). Duties of a purcha- ser.

(*i*) Edwards v. McLeay, Coop. 315, 2 Sw. 288.
(*k*) Gibson v. De Este, 2 Y. & C. C. 542.
(*l*) Wilde v. Gibson, 1 H. of L. Ca. 605.
(*m*) Turner v. Harvey, Turner & Russ. 171.
(*n*) 1 Sim. 89; S. C. 2 M. & K. 279.

2. *Constructive fraud.*] In general, a considerable inadequacy of price between parties contracting on equal terms is not a ground for refusing specific performance, much less for setting aside a contract (*o*). If the inadequacy is very great, it may amount to such a hard bargain that the Court will not enforce it; thus, when a lady sold two china jars for £40 which were worth at least £200, the Court thought it unreasonable to enforce the contract, though it would not set it aside (*p*). But the inadequacy may be so great as to amount to evidence of fraud. There may be such an inadequacy as to shew that the person did not understand the bargain he made (*q*), and such a degree of inadequacy of consideration as to amount to evidence of fraud (*r*).

Inadequacy of price,

shewing one party did not understand the contract.

In a case cited by Lord Hardwicke, an inadequate contract was held invalid at law: a person selling his horse for a barleycorn a nail, and two barleycorns for the second nail, and so on in geometrical progression, the jury were directed to find the value of the horse only (*s*) in an action by the vendor against the purchaser. So where a man proposed to sell his land at a halfpenny a square yard, and the purchaser went out to an attorney and got him to calculate the amount, and desired him not to tell the plaintiff how little it was, and then got the vendor to sign the agreement, the price coming to only £500 and the real value £2000, the Court of Exchequer said the desire of concealment would be such a fraud as to avoid the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price (*t*).

Inadequacy and advantage

Inadequacy of price, however, is a most important ingredient of the fraud which the Court

(*o*) Griffith v. Spratley, 1 Cox, 383.
(*p*) Falcke v. Gray, 4 Drew. 665.
(*q*) Heathcote v. Paignon, 2 B. C. C. 175; per Lord Thurlow.
(*r*) Davies v. Cooper, 5 M. & C. 270; see p. 277.
(*s*) James v. Morgan, 1 Lev. 111, quoted by Lord Hardwicke 1 Atk. 252.
(*t*) Dean v. Rastron, 1 Anst. 64.

considers to exist in a purchaser taking advantage of the necessity of the vendor to obtain the property at a low price. Necessity as well as inadequacy must be shewn (*u*). If there is such an inadequacy as to shew that the person was so oppressed that he was glad to make the bargain knowing its inadequacy, it will shew a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side and imbecility on the other, it puts the parties in such a situation as to shew that it could not have taken place without superior powers on the one side over the other (*v*).

taken of necessities of vendor.

Although an agreement with a man in jail may be good if he has proper assistance and advice (*w*), yet if not for a fair price it would be set aside (*x*).

It is seldom that the party who has sold under circumstances of necessity on his part for an inadequate price applies to set aside the contract, but the same principles as enable him to set aside the conveyance would apply.

Generally, if it be found that the vendor is in distressed circumstances, and that advantage is taken of that distress, it will avoid the contract (*y*).

The two kinds of fraud that we have discussed are those which make the contract void at law, and we have now enumerated the cases in which, the contract being void at law, a Court of Equity decrees it to be delivered up.

It will be convenient in stating the cases in which a Court of Equity rescinds the contract on the ground that although valid at law it is invalid in equity, first to consider those cases of fraud which are held fraudulent in equity only.

(*u*) Day v. Newman, 2 Cox, 77.
(*v*) Heathcote v. Paignon, 2 B. C. C. 175.
(*w*) Hinton v. Hinton, 2 Ves. Sen. 635; Wilkinson v. Stafford, 2 Ves. 635.
(*x*) Nicholls v. Nicholls, 1 Atk. 409; Brinkley v. Hann, Drury, 175.
(*y*) Wood v. Abrey, 3 Mad. 423.

The two cases of fraud which are held fraudulent in equity only are those which, in enumerating Lord Hardwicke's distinctions, we have called *Presumed Fraud* and *Collateral Fraud.*

Presumed Fraud.] This is fraud which equity presumes, from the circumstances and conditions of the parties contracting, where any advantage is taken of the weakness or necessity of another.

Contracting parties in a confidential relation.

The principle of a Court of Equity, that between parties standing in a confidential relation where the one has an influence over the other, the party under the influence cannot make an irrevocable gift to the party possessing the influence, is extended to a bargain between those parties. The well known case of *Huguenin* v. *Baseley* (*z*), which was a deed of gift, was the authority upon which Lord Cottenham relied in setting aside a contract between a surgeon and his patient in *Dent* v. *Bennett* (*a*). The rule applies to parent and child (*b*), guardian and ward (*c*), trustee and *cestui que trust* (*d*), attorney and client (*e*), and in the latter two cases not merely when the bargain is a sale by a trustee or attorney employed to sell (when, of course, he cannot sell to himself), but where the relationship merely exists (*f*).

Attorney and client.

The grounds of interference are the relationship and the advantage taken, but it is not necessary for the latter to be proved by the plaintiff if he seeks to rescind the bargain. It is for the party exercising dominion over the other to

(*z*) 14 Ves. 273.

(*a*) 4 M. & Cr. 277.

(*b*) Cocking v. Pratt, 1 Ves. Sen. 401. Of course, after the ward has attained twenty-one.

(*c*) Maitland v. Irving, 15 Sim. 437.

(*d*) Scott v. Davis, 4 M. & Cr. 87; Denton v. Donner, 23 Beav. 285.

(*e*) Gibson v. Jeyes, 6 Ves. 266; Cutts v. Salmon, 4 D. G. & S. 125; Gresley v. Mousley, 4 D. G. & J. 78; Stump v. Gaby, 2 D. G. M. & G. 623.

(*f*) When a corporation and hospital were in close connexion, it was held that they were incapable of contracting, and a purchase was set aside; Att. Gen. v. Corporation of Plymouth, 9 Beav. 67.

hew it was not to the other's disadvantage. If
n attorney sells to his client, "out of that state
f circumstances," says Lord Eldon, "this clear
luty results from the rule of this Court, and
hrows upon him the whole *onus* of the case;
hat, if he will mix up with the character of
ttorney that of vendor, he shall, if the propriety
f the contract comes in question, manifest that
e has given her all that reasonable advice
gainst himself that he would have given her
gainst a third person. It is asked, where is that
ule to be found? I answer, in that great rule of
he Court, that he who bargains in matter of
dvantage with a person placing confidence in
im is bound to show that a reasonable use has
een made of that confidence—a rule applying
o trustees, attornies, or any one else" (*g*). If a
erson standing in the relation of attorney, guar-
lian, or trustee makes a bargain with client,
vard, or *cestui que trust*, the proof lies upon him,
hat he has dealt with the other party, the client,
vard, &c., exactly as a stranger would have done,
aking no advantage of his influence or know-
edge, putting the other party on his guard,
ringing everything to his knowledge which he
imself knew (*h*). It follows that it is sufficient
or the plaintiff who seeks to set aside a contract
nade between him and a person having this re-
ation to him, to allege this relationship, in order
o put the defendant on the proof that no advan-
age was taken of it.

Trustee and *cestui que trust*.

Expectant heirs and reversioners are entitled
o set aside disadvantageous contracts for the
ale of their interests. In the earlier cases it
was held necessary to show that undue advantage
was actually taken of the situation of such per-
ons, but in more modern times it has been con-
idered not only that those who were dealing for
heir expectations, but those who were dealing
or vested reversions also, were so exposed to

Reversionary interests.

(*g*) 6 Ves. 278.
(*h*) Per Lord Brougham, in Hunter v. Atkins, 3 M. & K. 135.

imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners the onus of proving that they had paid a fair price (*i*).

On a bill filed by the seller of a reversion to have the contract delivered up which the purchaser did not show to be for an adequate price, the Court ordered the delivery up of the contract (*k*), and the same course was followed by Lord Cottenham (*l*). If the sale is by auction, the price is considered adequate (*i*).

Collateral fraud.] Where the fraud is an imposition and deceit on persons not parties to the agreement, it may, for convenience, be designated as collateral fraud.

Fraud on marital rights.

The principle is seen in the case of agreements upon marriage: that which is the open treaty of marriage shall not be affected by any underhand agreement. Where a brother, on the marriage of a sister, let her have a sum of money privately, that her fortune might appear as much as was insisted on by the other side, and the sister gave a bond to repay it, the bond was set aside (*m*); so a son's bond to his father who has made a settlement (*n*). The transaction being against public policy, the circumstance that the suing party is *particeps criminis* does not prevent his getting relief. So if the intended wife disposes of her property during the treaty of marriage, to the prejudice and without the knowledge of the husband, it is a fraud on him, and the disposition will be set aside (*o*). So underhand agreements in fraud of composition deeds are void against the creditors (*p*). Lord Hardwicke denounces

(*i*) Per Sir John Leach, V. C., Shelly v. Nash, 3 Madd. 232.
(*k*) Smith v. Hincksman, 3 Russ. 433; see p. 436.
(*l*) Davies v. Cooper, 5 M. & Cr. 270.
(*m*) Palmer. v. Neave, 11 Ves. 165.
(*n*) Gale v. Lindo, 1 Vern. 475.
(*o*) Goddard v. Snow, 1 Russ. 485; Prideaux v. Lonsdale 4 Giff. 159, 1 D. G. J. & S. 433.
(*p*) Cullingworth v. Loyd, 2 Beav. 385.

agreements for purchase of public offices as a fraud upon the public (*q*).

Contracts by heirs and persons having expectations from parents or friends, for the sale of those expectancies, are set aside, if for an inadequate consideration, on the ground of their being a fraud upon the ancestor; he is misled, and seduced to leave his estate not to his heir or family, but to a set of artful persons who have divided the spoil beforehand (*r*). Lord Brougham thought that if the person in possession knew of the sale, and did not oppose it, the usual protection to the reversioner was withdrawn (*s*). But this opinion is not concurred in by Lord St. Leonards (*t*). *Post obit* bonds, &c.

If money is deposited with a banker in separate accounts, and the banker knew the money received upon one account was the property of any other person than his customer, he has no right to allow the blending of the two accounts (*u*). It is a fraud on the other person. Trust money at a banker's.

It is rare that fraud of this character can be a ground for setting aside a contract, so as to prevent the party from suing upon it at law; because the damages which the one party would recover at law for a breach of the contract could not affect the third parties; it would, however, be the duty of the Court to set aside a contract for sale by an intended wife of her property, if the purchaser knew of her engagement, and concealed the contract from the intended husband. Contract seldom set aside for collateral fraud..

It is on the ground of the injury to third parties that contracts for the sale or purchase of trust property by trustees, which are for an inadequate price, are not executed by the Court (*v*). Contracts improvidently entered into by trustees Improper contracts by trustees.

(*q*) 2 Ves. Sen. 156.
(*r*) Twisleton v. Griffith, 1 P. W. 310; Cole v. Gibbons, 3 P. W. 290; Chesterfield v. Janssen, 2 Ves. Sen. 157: Cock v. Richards, 10 Ves. 429.
(*s*) King v. Hamlet, 2 M. & K. 456; see p. 473.
(*t*) Sugd. H. of L. 65.
(*u*) Pannell v. Harley, 2 Coll. 241; Bodenham v. Hoskins, 21 L. J. N. S. 867, 2 D. G. M. & G. 903.
(*v*) *Supra*, p. 193.

will not be enforced, but they will not be cancelled (*w*), the remedy of the law is left open to the purchaser (*x*).

Tenant for life *sans* waste contracting to sell fee.

In *Thomas* v. *Dering*, Lord Langdale would not compel a tenant for life, without impeachment of waste, who had contracted to sell the fee, to convey his life estate with an abatement, on the ground of the prejudice to the persons entitled in remainder (*y*). Lord St. Leonards does not concur in this view; the estate for life was without impeachment of waste, and the purchaser, no doubt, might sell the timber, but the Court ought not, his Lordship conceived, in such a case, to look at the interests of the tenant in tail, nor indeed could it protect them; for the tenant for life might fell the timber, or sell his life estate, with the right to cut it the next hour, and equity could not refuse to perform such a contract, however injurious it might prove to the tenant in tail (*z*).

17 & 18 Vict. c. 125, s. 83. Equitable defence at law.

In cases where the contract is void in equity only, and not at law, in an action at law the defendant may plead the invalidity in equity as an equitable defence under the Common Law Procedure Act, 1854, but the relief which he would get in equity must be absolute unconditional relief (*a*). The option of pleading this equitable defence at law does not prevent the defendant from suing in equity to set aside or restrain proceedings upon the contract (*b*), but if he has pleaded the equitable defence at law, grounded on equitable principles (*c*), he cannot get relief in equity (*d*).

(*w*) Turner v. Harvey, Jacob, 169; see p. 178; Evans v. Jackson, 8 Sim. 217 (case of a lease by trustee to sell); Goodwin v. Fielding, 4 D. G. M. & G. 90.

(*x*) Ord v. Noel, 5 Madd. 439; see p. 441.

(*y*) 1 Keen, 729.

(*z*) Sug. V. & P. 13th ed. p. 256.

(*a*) Flight v. Gray, 3 C. B. Rep., N. S. 320; Borrowman v. Rosser, 33 L. J. N. S. C. P. 114.

(*b*) Gompertz v. Pooley, 4 Drew. 448; Kingsford v. Swinford, 28 L. J. N. S. Ch. 413.

(*c*) Phelps v. Prothero, 7 D. G. M. & G. 722.

(*d*) Wild v. Hillas, 28 L. J. Ch. N. S. 170; Farebrother v. Welchman, 3 Drew. 122.

Delay of purchaser.] If, from the death of the purchaser and his affairs being in a state of embarrassment, delays take place, so that the vendor's object in selling the estate is defeated by the delays, he may file a bill to have the contract delivered up to be cancelled (*e*). So where the purchaser became bankrupt, having filed a specific performance bill to gain time, on a cross bill to have the contract cancelled it was ordered (*f*), after a decree for specific performance against the purchaser who made default, the vendor was on motion allowed to rescind the contract (*g*).

Want of title.] The practice as to rescinding contracts in case of the contract not having effect by reason of want of title is not well settled.

Semble, where vendor cannot make good title, purchaser may have contract annulled.

In *Gwillim* v. *Stone* (*h*) a decree was made on a bill by a purchaser to have the contract delivered up on account of the defective title of the vendor, the defendant, who did not appear: the bill also asked for compensation for the loss the purchaser had sustained. The Court decreed the delivery up of the contract, but as to the compensation left him to his remedy at law; where however he would get none (*i*). After a bill for specific performance by a vendor had been dismissed for want of title, Lord Manners granted an injunction to restrain an action at law by the vendor (*k*). In *Grover* v. *Hugell*, a judgment being obtained by the vendor, the purchaser filed his bill alleging no title in the vendor, and praying an injunction; that the contract for sale might be delivered up to be cancelled, and for the return

(*e*) Mackrath v. Marlar, 1 Cox, 259. Lord Eldon thought the bill was to have the contract executed or delivered up; Broome v. Monck, 10 Ves. 597; see p. 614. But this does not seem to be the fact, Sug. V. & P. 12th ed. p. 225.

(*f*) Steadman v. Lord Galloway, et e contra Rolls, 9 Feb. 1808, Sug. V. & P. 13th ed. p. 226.

(*g*) Foligno v. Martin, 16 Beav. 586.

(*h*) 14 Ves. 128, Lord St. Leonards queries this decision. Sug. V. & P. 13th ed. p. 197 (n).

(*i*) Flureau v. Thornhill, 2 W. Black. 1078.

(*k*) McNamara v. Arthur, 2 Ball & Beatty, 349.

of the deposit. Sir John Leach held that the equitable objection to the title could not have been taken advantage of at law (*l*), the bill was proper for the injunction and the return of the deposit, and that, without determining whether a bill will lie to have the contract delivered up where a good title cannot be made (*m*). V. C. Wood says, "except in *Gwillim* v. *Stone*, there is no instance of a contract being delivered up to be cancelled unless there was fraud in obtaining the contract itself" (*n*).

It is reasonable that a vendor should have no such relief, as his offering a property for sale without ascertaining the title is his own fault, and he can only be made answerable at law for the expenses the purchaser has been put to: but it is hard in the case of a purchaser, who remains exposed to an action at law for the whole price, and who has to defend himself at law by proving, it may be, an equitable objection to the title to the satisfaction of a Court of law, or to procure a transfer of the cause to a Court of Equity by a bill for specific performance, which he files with the certainty that he will have to pay his own costs if successful.

Contract set aside on ground of consequential relief.] The last class of cases in which equity decrees the delivery up of the contract is where relief is to be given consequential upon and accompanying the delivery up of the contract.

We have before adverted to the distinction between the Court's setting aside conveyances in pursuance of a contract, and setting aside the contract itself, which is only to prevent an action being brought at law; but if there have been partial conveyances, or money paid, or possession taken, it may be necessary not only to prevent

(*l*) This must mean that it was doubtful whether the Court of law would come to the same decision as a Court of Equity.

(*m*) 3 Russ. 428.

(*n*) Onions v. Cohen, 2 H. & M. 354; see p. 361.

the other party from suing at law, but also to give relief in these respects in equity.

This relief may be given even where the contract is void at law on the face of it (*o*).

Purchaser laying out money.

If the purchaser has entered into possession, and has, *bonâ fide* believing the title to be good, expended money in lasting improvements and repairs, he will be allowed them on a bill to set aside the contract (*p*).

Purchaser refusing title after taking possession.

When the purchaser had entered into possession and had objected to the title, which objections were valid, the vendor gave notice to him to abandon the contract and quit possession, and on his refusing filed a bill praying the cancellation of the agreement, and an account of rents and profits, which was decreed by Sir John Leach (*q*), and this though the vendor could have recovered possession at law (*r*). The prayer was that the purchaser should accept such title as the plaintiff could give him, or that the agreement should be cancelled; if the objection is one that cannot be got over, this is the proper form of praying relief (*s*).

Bill for return of deposit.

So, it is conceived, the purchaser when a good title cannot be made, and he has paid a deposit, may pray that the contract should be rescinded and the deposit repaid, and that he might be declared to have a lien on the premises for the amount (*t*). In general an alternative prayer in a bill for specific performance or for the return of the deposit will not be allowed (*u*); nor even since Sir Hugh Cairns' Act, if there is a bill for specific performance, and the Court thinks the agreement cannot be specifically performed, will

(*o*) Simpson v. Howden, 3 M. & Cr. 97.
(*p*) Edwards v. McLeay, 2 Sw. 287, Sug. V. & P. 13th ed. p. 614.
(*q*) King v. King, 1 M. & K. 441.
(*r*) Doe v. Burton, 16 Q. B. 807.
(*s*) Douglas v. London and North Western Railway Company, 3 K. & J. 173.
(*t*) See Clarke v. Faux, 3 Russ. 320, where the bill was apparently drawn by Lord Langdale.
(*u*) Sainsbury v. Jones, 5 M. & C. 1.

it turn the suit into a suit for damages (*v*), or of course the deposit. But a bill for the substantive relief of having the deposit returned, or if not returned raised by a sale of the land on which it is a lien (*w*), and for the cancellation of the contract, was held proper (*x*).

Form of plaint.] The form of plaint in cases of rescission of contract will be of course determined by the peculiar circumstances of the case; the allegations as to fraud must be precise (*y*), and the parties to it will be the parties to the contract. If any consequential relief is asked for, such as a lien, it may be asked against any person acquiring the property with notice; if any deeds are to be set aside a reconveyance should be asked for (*z*).

Until power of amendment is given to the plaintiff in the County Court, it will be proper to anticipate the defences by way of pretence or charge.

Defences.] The defences to a suit for rescission of a contract which do not consist of a denial of the allegations in the plaint must now be considered.

Good defence at law.

If the agreement is void at law on the face of it, there being no danger that the lapse of time might deprive the party to be charged upon it of the means of defence, and if there is no consequential relief, no account to be taken, and no provision for restoring the parties to their original position, the plaint is improper (*a*).

Knowledge of the misstatement being incorrect.

When the foundation of the plaint is misrepresentation by the defendant, the plaintiff must himself state that he relied on the misrepresentation (*b*); but the defendant may shew in defence and, if he can, should state that the plaintiff

(*v*) Per Lord Romilly, M. R., Lawrence v. Austin, 6 N. R. 310.

(*w*) Rose v. Watson, D. P., 33 L. J. N. S. Ch. 385.

(*x*) Wythes v. Lee, 3 Drew. 396; *supra*, 147.

(*y*) New Brunswick Company v. Conybeare, 9 H. of L. 711.

(*z*) Clark v. Malpas, 31 L. J. N. S. Ch. 696.

(*a*) Simpson v. Howden, 3 M. & Cr. 97; Corporation of Arundel v. Holmes, 4 Beav. 325.

(*b*) Jennings v. Broughton, 17 Beav. 234.

knew the actual state of the property (*c*), and such knowledge must be brought clearly home to the plaintiff (*d*).

Verification of statements by plaintiff.

The defendant may also shew that the plaintiff took measures to verify the statements made and inquired for himself. It was on this ground that the House of Lords reversed Lord Lyndhurst's decision in *Small* v. *Attwood:* the purchasers had free access to the books, the effect of which was stated, and satisfied themselves of the accuracy of the representations (*e*).

Confirmation.

A confirmation of a voidable agreement can only be valid if the party confirming is placed in a position to know that the agreement is voidable and his right to be relieved (*f*); as if the misrepresentation is disclosed, the duress or necessity or undue influence is removed, or the inadequacy of price stated; if under these circumstances the agreement is confirmed it will be a valid defence.

Waiver.

If the agreement is voidable for misrepresentation, the right to rescind it is waived, after a knowledge of the misrepresentation, by acting upon the contract. Investigating the title, after the misdescription is known, without objecting is sufficient (*g*); when the purchasers took possession with a knowledge of the misrepresentation, of mines, being not an ordinary estate which may be restored at the end of six months, but a property varying every day, it was a bar (*h*).

Restitutio in integrum impossible by plaintiff's act.

If a contract is voidable by the purchaser, alterations by him of the property which change its nature and character, and do not admit of reinstatement, will (after he knows his rights) deprive him of the aid of a Court of Equity in

(*c*) Dyer v. Hargrave, 10 Ves. 505.
(*d*) Price v. Macaulay, 2 D. G. M. & G. 339.
(*e*) 6 Cl. & Fin. 232; see Lord Cottenham's speech.
(*f*) Cole v. Gibson, 1 Ves. Sen. 508; Cockerell v. Cholmeley, 1 R. & M. 425.
(*g*) Stanton v. Tattersall, 1 Sm. & Giff. 535; Flint v. Woodin, 9 Hare, 618; see p. 622.
(*h*) Vigers v. Pike, 8 Cl. & Fin. 562; see Lord Cottenham's observations in 6 Cl. & Fin. 357.

rescinding the contract (*i*). In *King* v. *Hamlet* Mr. King sold the defendant's goods which he had obtained upon the credit of his reversion; Lord Brougham said it would be a strong case to justify the Court in holding that, after he gave the defendant notice that he repudiated the contract and desired him to take back the goods, he had a right to sell them (*k*).

At law the doctrine of repudiation cannot prevail where a man by his own act has put it out of his power to place the parties in the same position they were in at the time the contract was made (*l*). But neither at law nor in equity can a person, with the knowledge or the means of knowledge that a fraud has been committed upon him by which he has been led to purchase shares in a company, be permitted to hold those shares and receive dividends, and then repudiate the contract (*m*). Generally, in equity, a purchaser of perishable property complaining of misrepresentation, must not alter the character of the property after a knowledge of the fraud; but if before knowledge of fraudulent misrepresentations a purchaser of 100 shares in one mine had sold 20, he might have relief as to the 80 (*n*), though if the shares were in different mines no relief could be given; the contract must be rescinded as to each subject-matter or not at all (*o*).

Time bargains.

The Court will not assist a purchaser of shares seeking to have the contract set aside on the ground of misrepresentations, if the contract is in substance either to deliver the shares on a certain day or to make good the difference

(*i*) See Mr. Dart's proposition derived from Lord St. Leonards' silence as to Dunovan v. Fricker, Jac. 165; Dart's V. & P. 3rd ed. 293.

(*k*) King v. Hamlet, 2 M. & K. 456; see p. 481; see King v. Savery, 1 Sm. & G. 271, 299.

(*l*) Clarke v. Dickson, 27 L. J. Q. B. 223.

(*m*) Nicols' Case, 3 De G. & Jones, 383.

(*n*) Maturin v. Tredennick, 2 N. R. 514.

(*o*) S. C. 4 N. R. 15.

between the contract price and market price on that day; it is a species of gambling (*p*).

If the contract is sought to be cancelled on the ground of presumed fraud from the position of the plaintiff and his relative situation to the defendant, the defendant should show that the price was adequate; that the plaintiff was properly advised by a separate solicitor, and that he was aware of all material circumstances of the case: a trustee must show that every security and advantage were given to his *cestui que trust* (*q*): a solicitor must place a professional man between himself and his client (*r*). Plaintiff not *inops consilii*.

Lastly, the defendant may show that the plaintiff has, after a knowledge of the circumstances making the contract voidable and after the pressure upon him arising out of his situation or the influence of the other contracting party has been removed, delayed to apply to the Court for relief. This may be a defence when there has been no waiver—that is, no proceeding under the contract after its infirmity is known, and no alteration of the property after such knowledge as is incapable of reinstatement. Laches of plaintiff.

Where a misdescription was made of the acres of a property, calling them statute instead of customary, the Court, although thinking the contract voidable on the ground of mistake, refused to set it aside after four years' delay (*s*). In cases of fraudulent misrepresentation as to shares in mines, it is the duty of any one complaining of the fraud to put forward his complaint at the earliest possible period (*t*). Delay of three years in filing a bill to rescind a contract between attorney and client, for the sale of an estate, was held fatal to it, as the vendor could recover possession of the land in ejectment, although he might be sued at law (*u*).

(*p*) Rees v. Fernie, 4 N. R. 539.
(*q*) Denton v. Donner, 23 Beav. 285.
(*r*) Cutts v. Salmon, 4 D. G. & Sm. 125.
(*s*) Price v. North, 2 Y. & C. Exch. Eq. 620.
(*t*) Jennings v. Broughton, 5 D. G. M. & G. 126; see p. 139.
(*u*) Cutts v. Salmon, 4 D. G. & Sm. 125.

When the contract is void at law, the relief of rescission is discretionary with the Court (*u*).

Evidence.] With respect to the evidence there is nothing to be specially mentioned in suits for rescission; except that when actual fraud is alleged the evidence must be distinct and clear, and is the same in equity as at law; but when the question is, whether the contract was unduly obtained, it may be ordered to be delivered up on evidence upon which a jury would not be justified in impeaching it by the rules of law (*v*). For example, a conveyance by a client to his attorney may or not be good in equity; it is certainly good at law unless there is such gross fraud as that a jury would find that there was no deed at all executed (*w*); and the same rule applies to a contract.

Decree.] The decree, if a decree is made, will of course be varied according to the circumstances of the case. If the agreement has been partly performed by the execution of conveyances, yet if there is something left undone, or if the leaving the agreement uncancelled would expose the plaintiff to actions at law, the agreement will be decreed to be delivered up to be cancelled (*x*).

In general, and in a simple case, the decree will be as follows:—

"Declare that the contract contained in the agreement of the day of is void (*y*) and ought to be rescinded (*z*), and let the same be delivered up to the plaintiff to be cancelled."

Sometimes the reasons are added "as having been obtained by false and fraudulent misrepresentations" (*a*).

(*u*) Jennings v. Broughton, 5 D. G. M. & G. 126; see p. 139.
(*v*) Lord Eldon's observations in Fullagar v. Clarke, 18 Ves. 483.
(*w*) Stump v. Gaby, 2 D. G. M. & G. 623; see Lord St. Leonards' observations, pp. 630, 631.
(*x*) Bellamy v. Sabine, 2 Ph. 425, 443; Reynell v. Sprye, 1 D. G. M. & G. 656, 711.
(*y*) Decree in Reynell v. Sprye, 8 Hare, 273.
(*z*) Decree in Berry v. Armistead, 2 Keen, 228.
(*a*) Decree in Small v. Attwood, 6 Cl. & Fin. 278.

If a deposit or any other portion of the purchase money has been paid, an account will be taken of that with interest from the time of payment after the rate of £4 per cent. (*b*). If such fraud is shewn as that the money was recoverable at law, £5 per cent. seems to be the rate (*c*). Account.

If either party has taken possession, an account of the rents and profits will be added, and, if in actual occupation, an occupation rent will be fixed (*d*), but an allowance must be made for "lasting repairs and substantial improvements," if these are claimed by the plaint or statement in answer (*e*). It is doubtful whether the account will be taken of what, without wilful default, he might have received (*f*). Allowances.

An account will also be taken of the costs incurred by the purchaser, and a declaration will be added that, in default of payment of the deposit, the purchaser shall have a lien upon the property for the amount (*g*). Purchaser's costs, lien for deposit.

Costs.] The costs will generally, if a decree be made, follow the result and be given down to the hearing against the defendant (*h*). If the bill is dismissed, and it contains allegations of fraud which are disproved, it will be dismissed with costs (*i*); but if it is dismissed on the ground of delay, it will be dismissed without costs (*k*). So if delay exists, a decree may be made without costs (*l*).

(*b*) Same cases.
(*c*) Donovan v. Fricker, Jac. 165; Turner v. Harvey, Jac. 169.
(*d*) Decrees in Bellamy v. Sabine, 2 Ph. 443; in Gibson v. D'Este, 2 Y. & C. C. C. 501.
(*e*) Donovan v. Fricker (*loc. cit.*); Decree in Edwards v. McLeay, 2 Sw. 289.
(*f*) Murray v. Palmer, 2 Sch. & Lef. 489, Sug. V. & P. 13th ed. p. 214; but see Decrees in Gibson v. D'Este, and Murray v. Palmer, 2 Sch. & Lef. 490, *supra*, 14.
(*g*) Wythes v. Lee, 3 Drew. 396.
(*h*) Turner v. Harvey (*loc. cit.*); Gibson v. D'Este (*loc. cit.*); Davies v. Cooper, 5 M. & C. 277.
(*i*) New Brunswick Railway Company v. Conybeare, D. P., 31 L. J. N. S. Ch. 297.
(*k*) Cutts v. Salmon, 4 D. G. & Sm. 125; Lord Clanrickarde v. Henning, 30 Beav. 175.
(*l*) Salter v. Bradshaw, 26 Beav. 161.

Injunction and receiver.] An injunction will be granted to prevent any alteration in the character of the property pending the suit, as, for example, by restraining the presentation to a living (*m*).

A receiver also would be granted on account of the lien of the purchaser, if he has paid a deposit (*n*), and, if it is necessary, in order to keep the property *in statu quo* (*o*). When it is sought to set aside a sale of perishable property, although it may not be the duty of the plaintiff to preserve it *in statu quo* till the hearing, as long as he does not touch it (*p*), yet it would be far safer for him to apply for a receiver who could deal with it as the Court should direct.

(*m*) Greenslade v. Dare, 17 Beav. 502.
(*n*) Hall v. Jenkinson, 2 V. & B. 125.
(*o*) Boehm v. Wood, 2 J. & W. 236.
(*p*) Maturin v. Tredennick, 4 N. R. 15.

CHAPTER VI.

TRUSTEES RELIEF ACTS.

Jurisdiction 263
What Acts intended . . 264
SECT. I.
Lord Cottenham's Trustees Relief Act (10 & 11 Vict. c. 96).
Jurisdiction of County Court 264
Construction and Operation of the Act 265
Who is a Trustee under the Act 267
Title of Account . . . 268
Effect of Paying in . . . 268
Procedure 269
Mode of Paying in . . 269
Payment out 270
Form of Petition . . . 270
Procedure—continued.
Service of Petition . . 270
Subsequent Proceedings . 271
Costs 271
SECT. II.
Lord St. Leonards' Act (22 & 23 Vict. c. 35).
To what Cases the Act extends 274
Mode of Proceeding . . 275
Effect of Opinion of County Court Judge . . . 276
SECT. III.
Sir George Turner's Act (13 & 14 Vict. c. 35, s. 19).
Practice and Mode of Proceeding 276

Jurisdiction.] The 28 & 29 Vict. c. 99 provides (*a*) that the County Courts shall have and exercise all the power and authority of the High Court of Chancery (*b*) in all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of £500. In such proceedings the Judge has, in addition to his former powers, the powers and authorities of a Judge of the High Court of Chancery (*c*).

The mode of proceeding is by petition (*d*). The present Chapter is confined to proceedings under the Trustees Relief Acts, which, by s. 10, cl. 6, must be taken in a County Court district within

(*a*) Sect. 1.
(*b*) Clause 6.
(*c*) Sect. 2.
(*d*) Ord. XI. r. 1.

which one of the respondents resides or carries on business. See *supra*, p. 19.

What acts intended.] The expression "Trustees Relief Acts," seems primarily to refer to the statute 10 & 11 Vict. c. 96, entitled, "An Act for better securing trust funds and for the relief of Trustees," and the statute 12 & 13 Vict. c. 74, entitled, "An Act for the further relief of trustees" (being in fact merely an Act amending the former), and the 22 & 23 Vict. c. 35, entitled, "An Act to further amend the law of property, and to relieve Trustees."

The framers of the rules, orders, and forms have, however, in Form 20, which is an order for administration, headed it, "In the matter of the petition of A. B.": this seems to refer to the 13 & 14 Vict. c. 35, s. 19, which enables executors or administrators to clear the estate by means of an account taken in Court, and may be considered in the nature of a Trustees Relief Act.

SECT. I.

LORD COTTENHAM'S TRUSTEES RELIEF ACT.

10 & 11 Vict. c. 96, s. 1.

Jurisdiction of County Court.] The 10 & 11 Vict. c. 96 (*d*) (sometimes called Lord Cottenham's Trustees Relief Act, and which is, in general, the Act intended by the term "The Trustees Relief Act"), provides that trustees, &c., shall be at liberty, on filing an affidavit, to pay trust money "with the privity of the Accountant General of *the High Court of Chancery*, into the Bank of England, to the account of such Accountant General . . . . . in trust to attend the orders of the *said* Court," or to transfer trust funds into the name of the Accountant General, "in trust to attend the orders of the *said* Court," and that the receipt of the Bank cashier, or the certificate of the proper officer, shall be a sufficient discharge to the trustees, &c.

It is submitted that it is quite clear that the

(*d*) App. pt. II.

the benefit of this enactment, and of the discharge given by it, extends only to trustees who pay money into the name of the Accountant General, and that a payment to the registrar, or a transfer into the names of the registrar and treasurer, does not satisfy the requirements of the statute, since there is nothing in the 28 & 29 Vict. c. 99, or in the Orders and Rules, which substitutes these officers for the Accountant General. If this were not so, it would be competent for an executor to pay a legacy or share of residue, due to an infant or person absent beyond seas, under the Legacy Duties Act (*dd*) to the registrar of a County Court; but sect. 5 of the present Act shews that such power was not intended to be given, for, if it were, it would be unnecessary to give the County Court judge a power to order payment by such executor into the Court of Chancery under the provisions of the Legacy Duties Act. And it may be observed, that the Chancery of Lancaster Amendment Act (*e*) contains a section (*f*) expressly authorizing payment or transfer in certain cases to the joint account of the clerk and registrar in lieu of the Accountant General. There is, besides, nothing in the recent Act to indicate into what County Court a given trustee is to pay or transfer.

Money, stock, &c., must still be paid or transferred to the account of the Accountant General.

It being established, therefore, that the trustee must still pay or transfer in the mode adopted before the recent Act, the question arises whether the Accountant General of the Court of Chancery will be bound to obey the orders of a County Court judge if the fund carried to any particular account is less than £500. It is submitted he will not. For the Accountant General is an officer of the High Court of Chancery, and not of any County Court, which must exercise its functions by its own officers, and by the terms of the Trustee Relief Act the Accountant General

Whether, where fund less than £500, County Court has jurisdiction to order payment out.

(*dd*) 36 Geo. 3, c. 52, sect. 32.
(*e*) 13 & 14 Vict. c. 43.
(*f*) Sect. 12.

holds the fund in trust to attend the orders of the Court of Chancery. In confirmation of this view, we may again appeal to the language of the 13 & 14 Vict. c. 43, s. 12, expressly giving to the Duchy Court authority, and to the direction in the 5th section of the present Act, that the money paid in by order of the judge shall be dealt with by one of the Vice Chancellors.

In this state of things, a trustee can certainly not be advised to pay money, or transfer stock, &c., in any other way than he might have paid or transferred it before the recent Act. Whether a County Court will entertain an application as to money or stock so paid or transferred, is, as we have seen, doubtful. But, as it is impossible at present to pronounce decisively on the question, and as the omission to provide the requisite machinery for enabling the County Courts to work out proceedings under Lord Cottenham's Act, if such omission there be, was probably accidental, and therefore likely to be remedied, it has not been thought advisable to exclude reference to this statute.

In the meantime we may observe, that as a trustee is seldom justified in placing the trust funds in the name of the Accountant General under the Trustee Relief Act, except in the same circumstances which would justify the filing a bill for the execution of the trust, it will be advisable for a trustee, who wishes to avail himself of the County Court equitable jurisdiction, to file a plaint for the execution of the trust, and offer to place the trust funds in Court, rather than to attempt to avail himself of the Trustee Relief Acts in the County Court. Immediately upon such a plaint being filed, the trustee should move, upon notice to the defendants, for an order giving him liberty to place the trust funds in Court.

The 12 & 13 Vict. c. 74 enables the majority of the trustees to obtain an order empowering them to pay or transfer the fund into Court, notwithstanding the dissent by the minority.

In consequence of the difficulty referred to,

he best course seems to be, to shew in what way he statute has been construed and acted upon in he Court of Chancery. This will be sufficient o guide the practitioner in any similar proceed-ng in the County Court.

It is proposed, therefore, to state, in the first place, the leading points which have been decided upon the construction and operation of this sta-ute; and, secondly, the mode of procedure under it which obtains in the Court of Chancery.

Who is a trustee under the Act.] Where there was a power of sale contained in a will, but no power of giving receipts, V. C. Wood was of opinion that the purchase money might be paid into Court under the Trustee Relief Act (it is presumed at the vendor's expense), and that upon such payment the purchaser might safely complete (*g*). Person selling under power.

A mortgagee who has sold under a power of sale may, in a case of difficulty, pay the surplus sale monies into Court, after satisfying his mortgage debt (*h*).

It has been held that the purchaser of an estate subject to a pecuniary charge is not entitled to pay the amount of the charge into Court under the Trustee Relief Act (*k*). Purchaser of estate subject to a charge.

The money payable under a policy of life insurance may, in a case of doubt or difficulty as to the parties entitled to it, be paid into Court under the Act, a mere stakeholder being for this purpose considered a trustee (*l*). Assurance office.

Where a trustee, from ill health, was unable to sign the necessary papers for effecting a transfer into Court of a sum of stock, the Court appointed new trustees, upon their undertaking to make such transfer within a given time (*m*). Trustee too feeble to transfer.

(*g*) Cox v. Cox, 1 K. & J. 251. But see now 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 29.
(*h*) *Re* Ball's Mortgage Trusts, 3 W. R. 466.
(*k*) *Re* Buckley's Trusts, 17 Beav. 110; S. C. 22 Law J. Ch. 934.
(*l*) *Re* Hall's Policy, 10 W. R. 37; and *Re* United Kingdom Life Assurance Company, 6 N. R. 59.
(*m*) *Re* Dawson's Trusts, 3 N. R. 397.

Title of account.] In order to enable the Court to distribute a fund under this Act, it must stand to the account of some particular trust (*n*), for where it is paid in to the credit of a general account, as "upon the trusts of a will," it involves the general administration of the estate, and the Court will not order it to be transferred to a particular account, except at the request and on the responsibility of the trustee (*o*); but in one case where the fund had been paid in to the general account of a will, V. C. Wood ordered the transfer of it to the separate account of the person (an infant) named in the trustee's affidavit as the only person entitled, without directing the title of the account to be previously changed (*p*). A fund bequeathed in aliquot shares on distinct trusts ought not to be paid in to the joint account of the several trusts, but ought to be carried to separate accounts (*q*).

Fund divisible into aliquot shares.

Effect of payment into Court.] Upon the payment into Court under the Act, the trustee surrenders his trusteeship as to the particular fund paid in, and is at once relieved from all further responsibility respecting it, but he will still be answerable to his *cestuis que trustent* for any breach of trust which he may have previously committed (*r*), and he will still be liable for any costs which he may have deducted, and for any other monies which he retains in his character of trustee. But, although relieved from further responsibility, he is still the trustee of the fund until the Court has made some order respecting it (*s*). Under the Act the Court has full power to decide all questions which may arise concerning the fund paid in—*e. g.*, the construction of a

Trustee paying in not absolutely discharged till order made.

Questions of construction may be decided,

(*n*) *Re* Everett, 13 Beav. 485.
(*o*) *Re* Wright's Will, 15 Beav. 367.
(*p*) *Re* Coulson's Trusts, 4 Jur. N. S. 6.
(*q*) *Re* Tillstone's Trusts, 9 Hare, App. lix.
(*r*) *Re* Williams' Settlement, 4 K. & J. 87; Attorney General v. Alford, 4 De G. M. & G. 843.
(*s*) Warburton v. Hill, Kay, 470; See also Thomson v. Tomkins, 10 W. R. 310.

settlement (*t*), or the validity or invalidity of a deed (*u*), or whether a power of appointment has been properly exercised or not (*v*), just as in a suit; but where there are creditors or other unascertained claimants (*w*), or where the matter is one of great doubt or difficulty, the Court may, if it should think fit, direct a bill to be filed (*x*). But the Court will not, under this Act, reform a deed, although it may be satisfied that it was drawn up under a mistake (*y*). In one case the Court, upon the petition of the trustees, directed the fund to be distributed, as if an administration suit had been instituted, proper inquiries being directed (*z*). A suit will be directed only for the satisfaction of the Court, and not merely because the petitioner finds that a bill would be the more convenient course for establishing his title (*a*). An appeal will lie from the decision and if new matter is discovered since the decision a rehearing would probably be granted (*b*).

but a deed will not be reformed.

Inquiries.

Where bill will be directed.

PROCEDURE UNDER THE ACT IN THE COURT OF CHANCERY.

Mode of paying, &c., into Court.] All the trustees ought to join in the affidavit required by the Act, and care must be taken that it is not unnecessarily long (*c*). The form of the affidavit, and the course to be pursued by the trustee on paying in, are prescribed by the 41st Consolidated Order, r. 1—9 (*d*).

(*t*) *Re* Dalton, 1 De G. M. & G. 265.
(*u*) Lewis v. Hillman, 3 H. L. Ca. 607.
(*v*) *Re* Gratwick's Trust, 11 Jur. N. S. 919.
(*w*) *Re* Allen's Will, Kay, App. li.
(*x*) *Re* Bloye's Trust, 1 M. & G. 500.
(*y*) *Re* Malet, 3 Jur. N. S. 226.
(*z*) *Re* Trower's Trusts, 1 L. T. N. S. 54.
(*a*) *Re* Harris' Trust, 18 Jur. 721.
(*b*) See *Re* Smyth and Arnold's Estate, 2 N. R. 38.
(*c*) *Re* Waring, 16 Jur. 652; Consolidated Order, XLI., r. 1.
(*d*) See Appendix, Part II.

Payment out of Court—Petition.] Payment out of Court can only be obtained by petition, except the fund is less than £300, when the parties may take out a summons in Chambers.

Who may petition.

It is clear that the trustee is competent to present a petition, but the Court discourages such applications on his part, except there are special circumstances, considering that the parties beneficially interested ought to move in the matter (*e*).

Title and form of petition.

A claimant is allowed to proceed *in formâ pauperis* (*f*). The petition, and the affidavits in support of it, must be intituled in the matter of the Act, and in the matter of the particular trust, and ought to set forth the material statements of the affidavit made when the trust fund was paid into Court, as these statements form the only declaration of trust under which the Court can act (*g*); but the details must not be given at unnecessary length (*h*). The petitioner must name in the petition a place where he may be served with any petition or summons, or notice of any proceeding or order of the Court relating to the trust fund. (See Consolidated Order XLI., r. 8.) The prayer of the petitioner should state precisely the order which is wanted, and, if made by one of several claimants to the fund, it should ask that the shares of the others may be transferred to separate accounts (*k*).

Service of petition.] The regulations as to the mode of service are contained in Order XI.

Where a fund has been carried to a separate account, the trustee should in general be served (*l*); but the parties interested in the other shares need not be served (*m*). Where a person interested is out of the jurisdiction, and has not been heard of for some years, although

(*e*) *Re* Cazneau's Legacy, 2 K. & J. 249.
(*f*) *Re* Money, 13 Beav. 109.
(*g*) *Re* Levett's Trust, 5 De G. & Sm. 619.
(*h*) *Re* Courtois' Trust, 10 Hare, App. lxiv.
(*k*) *Re* Hawkes, 18 Jur. 33.
(*l*) *Re* Thomas' Will, 11 W. R. 276; but see *Re* Young, 5 W. R. 400.
(*m*) *Re* Hawkes, 18 Jur. 33.

diligent inquiries have been made, the Court will dispense with service upon him (*n*).

Where the parties interested are numerous, the Court has given leave to serve some of the members of a class on behalf of all (*o*). Where the petition relates only to income, it has been held unnecessary to serve the remaindermen (*p*).

Where an infant is served, a guardian *ad litem* should be appointed (*q*), which appointment will be made on motion on an affidavit that the proposed guardian is a relation, connection, or friend of the family, and has no interest adverse to the infant (*qq*).

Cross petitions.

Subsequent proceedings.] Where there is a contested claim, in strictness cross petitions should be presented; but by consent, the case may be treated as if a cross petition had been presented (*r*), and this is the course now generally adopted.

Evidence, inquiries, &c.

The statements in the petition should be strictly proved (*s*), and, if necessary, inquiries will be directed before any order is made as to the fund (*t*).

Fund divisible into numerous shares.

Where the fund was divisible into small sums, and the parties entitled gave their consent in writing, the Court ordered them to be paid to their solicitor, on his undertaking to pay them over (*u*).

Trustee made to pay costs.

Costs.] A trustee is not justified in paying the fund into Court where the title of his *cestui que trust* is clear, and if he do so he will be refused his costs upon the petition to get the money out of Court (*v*); and he has been ordered to pay the costs of the payment out of Court (*vv*). Thus in a

(*n*) See *Re* Hansford, 7 W. R. 199. 254.
(*o*) *Re* Colson's Trust, 2 W. R. 146.
(*p*) *Re* Whiting's Settlement, 7 Jur. N. S. 754.
(*q*) *Re* Ward's Will, 2 Gif. 122.
(*qq*) Foster v. Cautley, 10 Hare, App. xxiv.
(*r*) Lewis v. Hilman, 3 H. L. Ca. 607.
(*s*) *Re* Wood's Trust, 15 Sim. 469.
(*t*) *Re* Sharpe's Trust, 15 Sim. 470.
(*u*) Staines v. Giffard, 20 Beav. 484.
(*v*) *Re* Heming's Trusts, 3 K. & J. 40, 2 Jur. N. S. 1186.
(*vv*) *Re* Woodburn's Trusts, 1 De G. & J. 333, 3 Jur. N. S. 799.

case where the sole reason for the payment into Court was the refusal of other trustees to whom the fund was payable to give a formal deed of release, the trustee was ordered to pay all the costs of getting the money out of Court (*w*). Again, in a recent case where trustees transferred a fund into Court under an erroneous impression that certain events had happened which rendered the execution of their trusts more difficult, they were disallowed their costs of the petition (*x*). On the other hand, a trustee is justified in paying the money into Court in the following cases:—where he has actual notice of conflicting claims to it (*y*); but he must at the time of payment into Court give notice to the Court of the adverse claims (*z*): where the fund belongs to a married woman, and she and her husband require payment to be made to them (*a*), and this even where the married woman has repeatedly declared that she does not desire a settlement (*b*): where he pays the money into Court in order to avoid being associated with a trustee to whose appointment he objects (*c*): where the fund is settled upon a tenant for life and others in remainder, or the person entitled claims by representation (*d*); and generally it may be laid down that wherever a person has a fund in his hands of which he is either actually or constructively a trustee, and, after having made due inquiries, entertains *bonâ fide* legal doubts as to the rights of the parties beneficially interested in it, he is justified in paying the fund into Court, and will have his costs both of paying in and of appearing on the petition allowed (*e*).

Trustee disallowed his costs.

Where trustee will have his costs.

(*w*) *Re* Cater's Trusts, 25 Beav. 366; see also *Re* Knight's Trusts, 27 Beav. 45.
(*x*) *Re* Leake's Will, 1 N. R. 417.
(*y*) *Re* Headington's Trusts, 6 W. R. 7.
(*z*) *Re* Jenkins' Trust, 3 N. R. 408.
(*a*) *Re* Bendyshe, 3 Jur. N. S. 727.
(*b*) *Re* Swan's Settlement, 4 N. R. 53.
(*c*) *Re* Williams' Trusts, 6 W. R. 218.
(*d*) *Re* Lane's Trusts, 24 L. T. 181.
(*e*) *Re* Wylly's Trusts, 6 Jur. N. S. 906.

A trustee will generally deduct his costs from the fund before he pays it into Court, and where the fund is properly paid in, and the costs incurred are reasonable, there can be no objection to his doing so. If the trustee retain his costs, it seems that the Court has no jurisdiction in respect of them, except upon a bill filed (*f*). This doctrine seems to have been established by recent cases (*g*), in which it has been held that the Court has no jurisdiction under the Act to order a trustee to refund the costs retained. It can only refuse him *any* costs unless he submits *all* costs to taxation (*h*).

Semble, trustee cannot be compelled to refund costs of paying in, except by suit.

The costs of paying a fund into Court properly fall upon the general trust estate; but if there is no general trust estate applicable, then upon the particular fund itself (*k*). The costs of obtaining money out of Court will fall upon the *corpus* of the fund, when there are successive beneficial interests (*l*), and when the tenant for life petitions, his costs will not now fall upon the income (*m*), and indeed the costs of remaindermen have been borne by the *corpus* (*n*); but, as already remarked, it has been held unnecessary, in such a case, to serve the remaindermen at all (*o*). This will probably become the rule where the petition relates solely to the income and the costs of persons other than the trustees appearing thereon be for the future disallowed, or ordered to be paid by the petitioner.

General trust estate bears cost of paying in.

Costs of paying out fall on *corpus* of fund.

In one case where the fund paid in formed part of an estate which was being administered in Court, a share of the costs of the administration suit was thrown upon it (*p*). The costs of an

Fund paid in liable to costs of administration suit.

(*f*) *Re* Bloye's Trusts, 1 M. & G. 504; see, however, the Report of *Re* Woodburn's Trust in 26 L. J. N. S. Ch. 522.
(*g*) *Re* Leake's Will, 1 N. R. 417; *Re* Barber's Trust, 2 N. R. 571.
(*h*) *Re* Hue's Estate, 27 Beav. 337
(*k*) *Re* Cawthorne, 12 Beav. 56; *Re* Lorimer, 12 Beav. 521.
(*l*) *Re* Staples, 13 Jur. 273.
(*m*) *Re* Turnley's Will, 1 Law R. Ch. App. 852; 14 W. R. 322, L.C.
(*n*) *Re* Hadland's Settlement, 23 Beav. 266.
(*o*) *Re* Whiting's Settlement, 7 Jur. N. S. 754, *ante*, 271.
(*p*) Mutlow v. Mutlow, 4 D. G. & J. 539.

Respondent occasioning the payment must pay the costs of the petition.

application for payment out of Court may be ordered to be paid by a respondent who appears, and whose unfounded claim was the cause of the payment into Court. In such cases the trustee has his costs from the petitioner, who has them over together with his own from the other respondent (*q*).

Cost of parties served who claim no interest.

Where parties are served who claim no interest, it has been said that they ought not to appear (*r*), and their costs have been disallowed (*s*); but the practice cannot be considered as settled, and it is submitted that the petitioner ought to pay such costs, unless he offer to pay, and where practicable tender with the petition, the costs of perusal by the respondent's solicitor (*t*).

SECT. II.

LORD ST. LEONARDS' ACT (22 & 23 VICT. C. 35).

To what cases the Act extends.] Under the head of Trustees Relief Acts, in respect of which an equitable jurisdiction has been conferred upon the County Courts, must also be included the statute 22 & 23 Vict. c. 35, entitled "An Act to further amend the law of Property and to relieve Trustees," so far as it introduces any new mode of proceeding for the relief of trustees. Of the sections (26 to 32) which contain the provisions relating to trustees, the 30th only provides any special mode of relief and indemnity. Under this section any trustee, executor or administrator, may in a summary way obtain the opinion, advice and direction of the Court on any question respecting the management or administration of the trust property. Several of the earlier decisions extended the applicability of this section

Court will only give an opinion,

(*q*) *Re* Armston's Trusts, 4 N. R. 450; *Re* United Kingdom Life Assurance Company, 6 N. R. 59.

(*r*) *Re* Smith, *Ex parte* Fisher, 3 Jur. N. S. 659.

(*s*) Day v. Croft, 19 Beav. 518.

(*t*) The authorities on each side are collected in Morg. & Dav. p. 43; see also Scholefield v. Lockwood, 3 N. R. 177.

beyond mere matters of management, and under it questions as to the validity or construction of an instrument have received a judicial opinion (*a*); but the later cases have restricted the jurisdiction more closely to the words of the statute, and it is now clearly laid down that the Court will not under this section decide on a disputed question of title (*b*), nor construe an instrument, nor make any order affecting the rights to property (*c*), nor give an opinion upon questions of construction which ought to be argued, as the effect of a limitation contained in an instrument (*d*); or upon a mere hypothetical case, as where the direction of the Court was sought as to the mode in which calls not yet made on account of shares specifically bequeathed ought to be met (*e*), or upon mere matters of detail which cannot be dealt with except under the superintendence of the Court and with the assistance of affidavits (*f*), and where an important and difficult question, even of management, is involved, a bill or plaint should be filed (*g*).

&c., on questions of management, &c., not on doubtful points of construction.

Mode of procedure.] Every application under this section, both according to the practice of the Court of Chancery and that prescribed for the County Courts (*h*), must be by petition, and the signature of counsel will in every case be necessary (*k*). The petition may be presented by a trustee without the concurrence of his co-trustees, and it should itself contain all necessary information, and in the Court of Chancery no evidence is admissible (*l*), and no inquiry can be directed (*m*).

Petition.

No evidence admissible.

(*a*) *Re* Pitt's Will, 5 Jur. N. S. 1235.
(*b*) *Re* Draper, 9 W. R. 805.
(*c*) *Re* Lorenz, 1 Drew. & Sm. 401.
(*d*) *Re* Hooper, 29 Beav. 656, 30 L. J. Ch. 795.
(*e*) *Re* Box, 11 W. R. 945.
(*f*) *Re* Barrington's Trusts, 1 Johns. & Hem. 142, 6 Jur. N. S. 1073.
(*g*) *Re* Mockett's Will, Johns. 628.
(*h*) Ord. XI. r. 1.
(*k*) 23 & 24 Vict. c. 38, s. 9.
(*l*) *Re* Muggeridge's Will, Johns. 625.
(*m*) *Re* Mockett's Will, Johns. 628.

It is presumed that the County Courts will in this respect conform to the practice of the Court of Chancery, and that the judge in exercise of his discretion (*n*) will dispense with any affidavits.

Service of petition.

The County Courts Equitable Order XI., r. 2, directs that all persons beneficially interested in the trust are to be named in the petition, and copies for service on them are to be left with the registrar, who causes service to be effected, although service upon all persons interested need not be effected if the application is to the Court of Chancery and there are several parties with like interests (*o*). In the Court of Chancery there is no appeal from the opinion, advice or direction of the judge to whom the question has been submitted (*p*), and the same rule will hold in the County Courts.

No appeal.

Sect. III.

sir george turner's act (13 & 14 vict. c. 35, s. 19).

Practice and mode of proceeding.] The framers of the Rules and Orders have in Form 20 headed the accounts and inquiries in administration of assets, not only "In the suit of *A. B.* v. *C. D.*," but also "or in the matter of the petition of *A. B.*"

This assumes that an order under Sir George Turner's Act may be made by a County Court, and that this Act is in one respect a Trustees Relief Act. If this is held to be the case it is desirable that some short account of the proceedings under it be given.

The clauses in this Act and the 23 & 24 Vict. c. 38, are given in the Appendix, Part II.

The County Court may therefore, it seems, upon the petition of a personal representative of a

(*n*) Ord. XI., r. 8.
(*o*) *Re* Green's Trusts, 6 Jur. N. S. 530.
(*p*) *Re* Mockett's Will, Johns. 628.

deceased person, when the personal estate is sworn under £500, heard *ex parte* and without service upon any other person, make an order directing an account to be taken of the debts and liabilities affecting the personal estate. An affidavit must be made that no proceedings are pending to administer the estate.

Immediately upon the order being made, the Court may, on the application of the personal representative by motion, make an order in the nature of an injunction restraining any proceedings at law by any person claiming any debt or liability due from the estate of the deceased. This order may be made without notice of the motion if the Court shall think fit (*q*).

In practice this jurisdiction is seldom resorted to; a creditor's suit in equity cannot be restrained under it, at least until an order is made under the 22nd section, and the personal representative may generally find a friendly creditor in whose suit he may consent to a decree.

At the same time, if the executor is sued, or threatened with being sued, at law, the relief is rapid.

(*q*) As to the effect of these Orders, see *infra*, Ch. X.

CHAPTER VII.

THE TRUSTEE ACTS, 1850 AND 1852.

Jurisdiction, &c. . . . 278
Who is a Trustee within the Act,— Sect. 2 . . . 279
Vesting Order as to Land . 280
Appointing Person to Convey .
Vesting Order as to Stock, Choses in Action, *&c.* . . 282
Vesting Order as to Copyholds 284
Sales for Payment of Costs . 284
Estates of Infants, Unborn Persons, &c. . . . 284
Appointment of New Trustees by the Court . . . 285
Vesting the Property in the New Trustees 288
Who may apply . . . 289
Mode of Procedure . . . 290
Service of Petition . . 291
Evidence 292
Amendment . . . 292
Order 293
Costs 293

Jurisdiction, &c.] The recent Act gives to the County Courts all the power and authority of the High Court of Chancery in (*a*) all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the sum of £500. In all such matters the judge of the County Court has, in addition to his former powers and authorities, all the powers and authorities of a judge of the High Court of Chancery.

Mode of proceeding.

The mode of proceeding is by petition (*b*).

In the last chapter the Trustees Relief Acts have been considered. The present chapter is devoted to the Trustee Acts.

Forum.

By sect. 10, cl. 2, proceedings under the Trustee Acts, 1850 and 1852, are to be taken in the County Court within the district of which the persons making the application or any of them reside or resides.

(*a*) 28 & 29 Vict. c. 99, s. 1, cl. 5.
(*b*) Ord. XI., r. 1.

In treating of these Acts the sections 3, 4, 5 and 6 of the Trustee Act, 1850, which contain provisions relative to the case of a lunatic trustee or mortgagee, may be wholly excluded from consideration as they relate to the jurisdiction in lunacy, no part of which is given to the County Courts.

Trustee Act, 1850, ss. 3, 4, 5.

County Court has no jurisdiction in lunacy.

Who is a trustee within the Act,—sect. 2.] By the interpretation clause (sect. 2) a person who is only constructively a trustee is within the Act. Accordingly, a vendor after a contract for the sale of shares in a joint stock banking company (which are stock for the purposes of the Act) was held to be a trustee (*c*); but the infant heir of a person who has died intestate, leaving real estate, which he had in his lifetime contracted to sell, is not a trustee for the purchaser, unless the constructive trust has first been declared by a decree of the Court (*d*), so that in such a case a suit for the specific performance of the contract is necessary. It seems clear that in a mortgage by way of underlease a declaration by the mortgagor that he will hold the outstanding reversion in trust for the mortgagee, will constitute him a trustee within the meaning of the Act, but otherwise if there be merely a covenant for the assignment of the nominal reversion (*e*).

Sect. 2.

Vendor of shares.

Vendor of land.

Mortgagor of leaseholds.

Where a testator had in his lifetime agreed to give an option to his lessee to purchase the fee, and the lessee did not declare his option until after the testator's death, an infant tenant in tail of the legal estate under the testator's will was held not to be a trustee for the lessee within the meaning of the Act; but a suit for specific performance was directed (*f*). Where a vendor, after conveying the equitable estate, became seised of the legal estate, and died intestate and without

Option in leases.

Vendor acquiring legal estate after conveyance.

(*c*) *Re* Angelo, 5 De G. & Sm. 278, 16 Jur. 831.
(*d*) *Re* Carpenter, Kay, 418.
(*e*) *Re* Propert, 22 L. J. Ch. 948; see now 23 & 24 Vict. c. 145, s. 15.
(*f*) *Re* Weeding's Estate, 4 Jur. N. S. 707.

an heir, he was considered a trustee within the Act, and a vesting order was accordingly made (*g*). The terms "trust" and "trustee" include cases where the trustee has some beneficial estate or interest in the property subject to the trust (sect. 2).

Heir where power of sale imperfect.

Where a will contained a direction to sell real estate without naming the persons to sell, and there was no devise of the real estate, and no sufficient legal power of sale implied in the executors (*gg*), the heir of the testator was held to be a trustee (*h*).

Heir where trustee disclaims.

So also an heir upon whom an estate descends by reason of the disclaimer of the devisee, is a trustee within the Act (*k*). Other cases, which illustrate the meaning of the word "trustee" will be noticed below.

Sect. 7. Dower uses.

Vesting order as to land.] Under the 7th section the Court will vest an estate in a purchaser to uses to bar dower, but will not direct the insertion of a declaration against dower (*l*).

Form of order where one of the petitioners a *feme coverte*.

Where executors (one of whom was a married woman) applied for an order vesting the legal estate in them, the Court made an order vesting the estate in the petitioners to such uses as they should appoint, and in default to them in fee, so as to avoid the necessity of having the deed acknowledged by the married woman (*m*), and the estate tail of an infant remainderman will, if the protector consent to the vesting order, be barred under this section.

Barring estate tail.

Ss. 9, 10. Estate of dower trustee.

The estate of a dower trustee, resident out of the jurisdiction, was, under the 9th section, vested in a purchaser (*n*), and under the 10th section, when a legal estate vested in a mortgagee had descended upon two coparceners, one of whom

(*g*) *Re* Wilkinson, 10 Jur. N. S. 716.
(*gg*) See Robinson v. Lowater, 17 Beav. 592; S. C. 3 De G. M. & G. 272.
(*h*) Hooper v. Strutton, 12 W. R. 367.
(*k*) Wilks v. Groom, 6 De G. M. & G. 205.
(*l*) *Re* Lush's Estate, 5 De G. & Sm. 436.
(*m*) *Re* Powell, 4 K. & J. 338, 6 W. R. 136.
(*n*) Collard v. Roe, 4 Jur. N. S. 431.

was out of the jurisdiction, an order was made vesting it in the other alone (*o*). A doubt formerly existed whether an order vesting the lands subject to the trust in the new and the continuing trustees would not have the effect of severing the joint tenancy, but this doubt is now entirely removed (*p*).

Parcener out of jurisdiction.

Joint tenancy not severed.

It will be observed that by the interpretation clause (sect. 2) it is declared that the word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage, and that the word "mortgage" shall be applicable to every estate, interest or property in lands or personal estate, which would in a Court of Equity be deemed merely a security for money. Where, however, the mortgage of a fee simple estate is in the form of a trust for sale, and the ultimate trust of the sale proceeds is for the mortgagor, his *executors or administrators*, the mortgagee dying intestate and without an heir will be considered a trustee within the 15th section (*q*). This section does not apply to leaseholds (*r*), though the 34th section does. Where the legal estate in a term is outstanding, a new trustee may be appointed and a vesting order under the 34th section made.

Sect 15. Mortgagee.

Mortgage in form of trust for sale.

Leaseholds

By the 19th section power is given to make vesting orders where lands are derived from a mortgagee who has died without having entered into possession, and the money due in respect of such mortgage has been paid, or the person entitled to receive the same consents to an order of *reconveyance*. Although this section seems only intended to apply to the case of reconveyance to the mortgagor where the mortgage has been satisfied, or the mortgagee consents, yet under it the executor of a mortgagee who had not entered into possession, and to whose estate the mortgage

Sect. 19. Reconveyance of mortgaged estate.

When legal estate will be vested in mortgagee's executor.

(*o*) *Re* Templer's Trusts, 4 N. R. 494.
(*p*) Smith v. Smith, 3 Drew. 72; Marquis of Bute's Will, 5 Jur. N. S. 487.
(*q*) *Re* Underwood, 3 K. & J. 745; *Re* Keeler, 9 Jur. N. S. 95.
(*r*) *Re* Mundel's Trust, 6 Jur. N. S. 880.

debt remained due, obtained an order vesting in him the legal estate which had descended to the mortgagee's heir who could not be found (*s*). But see *Re Hewitt* (*t*), from which it appears that such an order will not be made under this section unless it is intended to sell or transfer the mortgage. It may be doubted whether the estate of the deceased mortgagee is a trust estate within the meaning of the words of the County Court Act, s. 1, cl. 5; and it is clear that if that estate is not stated to be under the value of £500, the jurisdiction does not exist, although the mortgage money may be under that sum.

Appointing person to convey.] Under the 20th section the Court has power, instead of making a vesting order, to appoint a person to execute a conveyance, assignment or release of *lands*.

Mode of effecting a partition.

Where on a partition the shares of the parties were very minute and complicated, the Court, to save expense, instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to the others, and vested the whole in a person to convey to the several parties their allotted shares (*u*). So also where the lots and the parties under disabilities were numerous (*v*).

Sect. 22.

Vesting order as to stock, choses in action, &c.] It has been doubted whether the 22nd section authorizes an order vesting the stock, &c., in the *cestui que trust* (*w*); but in one case a trust fund was, under this section, vested in the *cestui que trust*, who had become absolutely entitled (*x*), and in another case the share of a party beneficially interested was transferred to him (*y*).

Vesting stock, &c., in *cestui que trust*.

Sole trustee out of the jurisdiction.

In one case, V. C. Parker held that an infant sole trustee, out of the jurisdiction, was not within

(*s*) *Re* Boden, 1 De G. M. & G. 57; *Re* Lea, 6 W. R. 482.
(*t*) 27 L. J. Ch. 302.
(*u*) Shepherd v. Churchill, 25 Beav. 21.
(*v*) Hancox v. Spittle, 3 Sm. & G. 478.
(*w*) *Re* Brass's Trust, 4 W. R. 764.
(*x*) *Re* Ryan's Settlement, 9 W. R. 137.
(*y*) *Ex parte* Bradshaw, 2 De G. M. & G. 900.

this section (*z*), but this difficulty has been removed by the Trustee Extension Act, sect. 3, and in such a case a vesting order will now be made (*a*). The two representatives of a *sole* deceased trustee are within the section (*b*), and the husband of an executrix, if he be out of the jurisdiction, is a trustee (*c*).

Future dividends.

It was formerly held that the words "to receive the dividends thereof" applied only to dividends due at the date of the order and severed from the stock (*d*); but this decision has been overruled, and they are now construed as authorizing an order vesting the right to receive future dividends (*e*).

Sects. 23 and 24.

Trustee refusing to transfer.

Sections 23 and 24 give power to the Court to make a vesting order in cases where a *sole* trustee, or one of two or more trustees of stock, shall refuse to transfer the same according to the direction of the person absolutely entitled. In one case (*f*) Parker, V. C., thought that the words "sole trustee" might mean all the trustees if more than one, but in a later case it has been held that these sections do not apply where there are two trustees, and both refuse to transfer (*g*). The case of a trustee refusing to obey the order of the Court does not fall within these sections (*h*); but see now the Trustee Extension Act, sect. 4, which gives the Court power to make an order vesting the right to transfer stock where a trustee shall, for twenty-eight days after service on him of an order of the Court for that purpose, refuse to make such transfer.

Trustee refusing to obey order of Court.

Trustee Extension Act, sect. 4.

Where the surviving trustee of a sum of stock neglected for twenty-eight days after a request in writing had been made to him by persons who

(*z*) Cramer v. Cramer, 5 De G. & Sm. 312.
(*a*) Sanders v. Homer, 25 Beav. 467.
(*b*) *Re* Hartnall's Trusts, 5 De G. & Sm. 111.
(*c*) *Ex parte* Bradshaw, 2 De G. M. & G. 900.
(*d*) *Re* Hartnall's Trusts (*loc. cit.*)
(*e*) *Re* Peyton's Settlement, 2 De G. & J. 290.
(*f*) *Re* Hartnall's Trusts (*loc. cit.*)
(*g*) *Re* Spawforth, 12 W. R. 978.
(*h*) Mackenzie v. Mackenzie, 5 De G. & Sm. 338.

had been duly appointed new trustees to transfer the stock to them, the Court held that they were persons absolutely entitled within these sections, and ordered the stock to be transferred to them (*k*); but one of two trustees is not a person "absolutely entitled," nor is a tenant for life, except where the application is limited to the income (*l*).

Sect. 28. Mode of taking consent of lord.

Vesting order as to copyholds.] It is clearly settled that it is not necessary for the lord of the manor to appear in Court and consent to a vesting order under the 28th section. A verified certificate of his consent will be sufficient (*m*); but it still remains doubtful whether his consent should be obtained previously to drawing up the order, or whether the Court will make an order *valeat quantum* without his consent (*n*).

Sect. 29.

Sales for payment of costs.] A sale for the purpose of providing a fund for the payment of *costs of suit* to which an estate had become liable was held not to be within the 29th section (*o*), such costs not being *debts* of the deceased person; but see how the Extension Act, sect. 1, where the provisions of the Act are extended to a decree directing the sale of lands *for any purpose whatever.*

Trustee Extension Act, sect. 1.

Sect. 30.

Estates of infants, unborn persons, &c.] The 30th section enables the Court to carry its decrees into effect by orders vesting the estates of infants, and all persons under legal disabilities, and even the interests of unborn persons, in the parties to whom the conveyance is to be made, and the practice of giving an infant in such cases a day to show cause is completely abolished (*p*). The decree or order in these cases is always pre-

Form of order.

(*k*) *Ex parte* Russell, 1 Sim. N. S. 404; see also Ellis' Settlement, 24 Beav. 426; *Re* Baxter's Will, 2 Sm. & G. App. 5.

(*l*) Mackenzie v. Mackenzie, 5 De G. & Sm. 338.

(*m*) Ayles v. Cox, 17 Beav. 585.

(*n*) Cooper v. Jones, 2 Jur. N. S. 59; *Re* Flitcroft, 1 Jur. N. S. 418.

(*o*) Weston v. Filer, 2 De G. & Sm. 608.

(*p*) Bowra v. Wright, 4 De G. & Sm. 265.

faced by a declaration that the infants or other persons under disability are trustees within the Act, and that the interests of any unborn persons who might claim an interest in the lands are the interests of persons who on coming into existence would be trustees within the Act, and then follows a vesting order or a direction to convey. It will be observed that the provisions of this section are not confined to cases of infancy or other disability, but that the Court has power to declare that any of the parties to the suit are trustees within the Act. Thus, where a donee of a power of jointuring under a settlement was ordered in a suit for specific performance to execute the power by a deed, and he refused to do so, he was declared a trustee of the rights, interests, estates and property acquired by him under the settlement; and a person was appointed to convey in his stead (*q*). The Court, in making an order for foreclosure absolute at the suit of an equitable mortgagee, refused to add a declaration that the mortgagor, being out of the jurisdiction, was a trustee within this section, in order to found upon it a subsequent application for a vesting order, and held that such a declaration can only be obtained on a separate application (*r*).

Donee refusing to execute power.

Foreclosure of equitable mortgage.

Appointment of new trustees by the Court.] Sect. 32. The statute 11 Geo. 4 & 1 Wm. 4, c. 60, gave the Court of Chancery power to appoint new trustees "where the recent creation or declaration of the trust or other circumstances might render it safe;" but under the 32nd section of the Trustee Act, 1850, no restraint whatever is imposed upon the Court in the exercise of the jurisdiction to appoint new trustees. The absence in the instrument creating the trust of any power of appointing new trustees will, it is to be remembered, be supplied, as to instruments executed after 28th August, 1860, by Lord Cranworth's Act (*s*).

(*q*) *Ex parte* Lady Mornington, 4 De G. M. & G. 537.
(*r*) Smith v. Boucher, 1 Sm. & G. 72.
(*s*) 23 & 24 Vict. c. 145, s. 27.

Where a settlement contained such a power, which the donee was capable and desirous of exercising, it was held that the Court had no jurisdiction to appoint, however corruptly he might intend to exercise it (*t*).

Trustee an infant.

The following are some of the principal cases in which the Court has exercised its jurisdiction under this section. Where a testator devised his estate to two trustees, one of whom was an infant upon trusts for sale, the Court declined to make an order vesting the whole estate in the other trustee, but appointed a person to be trustee in the room of the infant, and vested the whole estate in such new trustee jointly with the original adult trustee (*tt*). Where a trustee had been absent from this country for twenty years, Stuart, V. C., held that he was incapable of acting in the trusts within the meaning of the trust deed (*u*); but temporary absence, without an intention of permanent residence abroad, is not a sufficient ground for applying for the appointment of a new trustee (*v*); and in one case it was held that a power to appoint a new trustee on an existing one becoming incapable to act did not apply to the case of a trustee who had gone to reside in China (*w*). This last case is very shortly reported, and it does not appear whether the residence abroad was likely to be permanent or whether the special circumstances of the trust necessitated an immediate appointment of a new trustee; but it is apprehended that whenever such a necessity exists, and evidence of the trustee's intention permanently to reside abroad can be obtained, the Court will appoint a new trustee under this section. The incapacity which is contemplated in the words "become incapable to act" is the personal incapacity of the trustee, and a trustee

Trustee abroad.

(*t*) *Re* Hodson's Settlement, 9 Hare, 118.
(*tt*) *Re* Porter's Trust, 2 Jur. N. S. 349.
(*u*) Mennard v. Welford, 1 Sm. & G. 426.
(*v*) *Re* Moravian Society, 26 Beav. 101.
(*w*) Withington v. Withington, 16 Sim. 104.

who had become bankrupt and been indicted for not surrendering to the fiat and had absconded, was held not to have thereby become incapable to act within the meaning of the power (*x*); but bankruptcy, though not a legal incapacity, may constitute a disqualification where the words are "become *unfit* or incapable to act," as in the 27th section of stat. 23 & 24 Vict. c. 145. Where a trustee becomes bankrupt, and it is desired to appoint a new trustee in his place, the proper proceeding is under the 130th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106 (*y*). Lunacy is of course a personal incapacity. Where this is the sole ground for seeking the appointment of a new trustee the application must in every case be made to the Lord Chancellor or the Lords Justices sitting in Lunacy: but where the lunatic trustee is also under some other disability, as *e. g.* infancy, the case falls within the ordinary jurisdiction of the Court of Chancery (*z*). The Court has no power under this section to displace a trustee who is desirous of continuing in the trust, especially where he is charged with misconduct (*a*); and wherever the delinquency of the trustee is alleged as the ground for appointing another person in his place a bill or plaint should be filed (*b*).

Trustee bankrupt.

Trustee lunatic.

Trustee can only be removed by suit.

Some little doubt at first existed whether this 32nd section applied to a case where there was no existing trustee under the instrument creating the trust. The doubt does not seem to have been well founded, and Parker, V. C., at once overruled an objection which was rested on this ground (*c*). But see now the Trustee Extension Act, 1852, sect. 9, which has removed all possibility of misapprehension. As to the proper persons to be appointed, see *supra*, Chap. III. p. 101.

New trustee appointed though no existing trustee.

Trustee Extension Act, sec. 9.

(*x*) *Re* Watts' Settlement, 9 Hare, 106.
(*y*) See also *supra*, Chap. III., p. 116.
(*z*) *Re* Arrowsmith's Trusts, 4 Jur. N. S. 1123.
(*a*) *Re* Blanchard, 7 Jur. N. S. 505.
(*b*) *Re* Harvey, 5 De G. & Sm. 67; *Re* Bridgman, Dr. & Sm. 164.
(*c*) *Re* Tyler's Trust, 5 De G. & Sm. 56.

Court may augment or reduce original number of trustees.

The Court has power under this section to augment or reduce the number of trustees, and will do so where the circumstances of the trust property or the duties of the trust seem to justify such a course. The general rule is, that in appointments out of Court the original number must be kept up: whether the necessity for doing this out of Court will justify an application to the Court to appoint, and in such appointment to vary the number, has not, it seems, been decided.

Whether a sole trustee will be appointed.

As a general rule the Court of Chancery will never appoint a sole trustee, even where there has been originally only one trustee; but in the County Courts, having regard to the small value of the estates which fall within their jurisdiction, this rule may probably be relaxed and a sole trustee not infrequently be appointed.

Affidavit of fitness.

In every case the Court requires to be assured of the fitness of the proposed new trustees by the affidavit of a competent person, who should not be the solicitor of the parties; and the new trustees should either

Consent of proposed trustee.

consent in Court or a memorandum in writing testifying their consent and verified by affidavit will be required.

Powers of the new trustees. Sect. 33.

The 33rd section gives to the trustees appointed under the Act the same power as if appointed by a decree, and the statute 23 & 24 Vict. c. 145 has expressly given to every trustee appointed by the Court of Chancery the same powers, authorities and discretions as if he had been originally nominated a trustee by the instrument creating the trust. The benefit of this provision will extend to trustees appointed by a County Court judge, and in future no question can arise as to what powers may or may not be exercised by the new trustees.

Sect. 34.

Vesting the property in new trustees.] Under the 34th section the Court has power, and it is the usual practice, to make a vesting order instead

Land.

of directing a conveyance of freeholds or assignment of leaseholds to be executed, even where there is no incapacity in the person seised or possessed of the legal estate to make such con-

veyance (*e*). The order will of itself divest the whole estate from the continuing and incapacitated trustee.

Sect. 35. Stock, &c.

The Court had no power under this section to vest the right in the stock itself, but only the right to call for a transfer of it, and an order which purported to give the right to the stock itself was discharged (*f*). But see now section 6 of the Trustee Extension Act, which gives the legal right to transfer the stock whether the form of the order vests the right to the stock, or the right to transfer it, or the right to call for such a transfer.

Trustee Extension Act, sec. 6.

Sect. 37.

Who may apply.] Any person beneficially interested, notwithstanding infancy or other disability, or a trustee duly appointed, may apply under the 37th section; but since all the *cestuis que trustent* have a concern in the appointment, and ought generally to be before the Court, they should, where practicable, be made co-petitioners, in order to avoid expense. It is not necessary that the beneficial interest should be in possession; a contingent interest in remainder in the trust property gives the right to apply (*g*). Creditors of a testator who have obtained a decree for the administration of his estate with a direction for the sale of his realty, have been held to be parties beneficially interested within this section (*h*).

All the *cestuis que trustent* should petition.

Owner of contingent interest.

Creditors under decree.

New trustees of charities.

Appointment of new trustees of charities of an annual income under £50 may be made by the County Court judges, under the Charitable Trusts Acts, 1853, sect. 32, and 1860, sect. 11.

Vesting orders of equities not required.

The object of the Trustee Acts was to enlarge the summary powers of the Court of Chancery over *legal* estates and rights in property; and they do not apply to mere equitable interests which, independently of any statutory pro-

(*e*) *Re* Manning's Trusts, Kay, App. xxviii.
(*f*) *Re* Smyth's Settlement, 4 De G & Sm. 499.
(*g*) *Re* Sheppard's Trusts, 1 N. R. 76.
(*h*) Re Wragg, 2 N. R. 49.

vision, the Court is competent to bind by its decree. Thus, a vesting order as to the equity of redemption in an infant against whom, in a foreclosure suit, a decree had been made, was refused on the ground that the mortgagee had the legal estate, and that all equities were bound by the order for sale (*h*). It becomes therefore necessary, in determining whether a vesting order is required, to consider whether the person in respect of whose estate or right such order is sought is *legally* entitled. This is sometimes a difficult question, as *e. g.* where a will is so framed as to leave it in doubt whether the trustees do or do not take the legal estate. In all matters within the scope of the Trustee Acts, except in those where the lunacy of the person legally entitled forms the sole ground of jurisdiction, the judge of the County Court will, subject to the prescribed limit as to value, have the same powers and authorities as a judge of the Court of Chancery. There are probably very few estates or funds, the subject of deeds of settlement, which do not exceed in value the sum of £500; and applications for the appointment of new trustees under deeds of settlement, and for the vesting orders consequent thereon are not likely to be numerous, but there may be many cases where the completion of a small mortgage or sale transaction is hindered by reason of an outstanding legal estate; or, under wills where the legal right to a small sum of stock or *chose in action* may be vested in a person under disability, or who cannot be found or reached; and under deeds of settlement it may be necessary to have trustees of a portion only of the fund, the residue belonging to persons *sui juris*. In all such cases the provisions of these Acts may be usefully applied in the County Courts.

Mode of procedure.] We now proceed to consider the mode of procedure under these Acts.

(*h*) *Re* Williams, 5 D. G. & Sm. 575.

The application is made to the County Court within the district of which the applicants, or any one of them, resides. The application is by petition; and although under some of the sections it must be made in the Court of Chancery at Chambers (*k*), in the County Courts a petition must be presented in every instance. The County Court orders do not give the form of a petition by parties beneficially interested. But such parties are entitled to petition, and in practice, in the Court of Chancery, they generally are the only persons making the application. And since if the trustee petitions all persons beneficially interested must be served by Order XI., rules 2, 6 and 7, and they need not all be served if one of the beneficiaries petitions, the latter course is the cheapest (*l*). Wherever practicable all the *cestuis que trustent* and the continuing trustee (if any) should be made co-petitioners, so as to avoid the expense of service. A married woman, or an infant, must petition by a next friend. From the form appended to the County Court orders it would appear to be sufficient if the petition is entitled in the matter of the particular trust, without being also entitled in the matter of the Trustee Act, 1850, but it may be convenient in this respect to follow the practice of the Court of Chancery (*m*). The petition should in itself contain statements sufficient to raise the jurisdiction, and to justify the order which is sought to be obtained; and it is submitted that in the County Courts such a statement of material facts will be required, notwithstanding Order XI., rule 1.

Who should be petitioners.

Title of petition.

Form of petition.

Service of petition.] The rule as to service, when the petition is by any person other than the trustee, will probably be that all persons directly or indirectly interested in the application, and whether under disability or not, should, unless they appear as petitioners, be named in the

All parties interested should be represented.

(*k*) Cons. Ord. XXXV.
(*l*) *Re* Smyth's Settlement, 2 D. G. & Sm. 781.
(*m*) *Supra*, p. 47.

petition, and that a copy for service upon them should be left with the registrar. If the parties are very numerous service upon all of them is in the Court of Chancery dispensed with (*n*), and this may be followed in the County Courts.

Parties numerous.

Where the shares of any of the parties beneficially interested are in settlement, the trustees of such settlement may be taken sufficiently to represent their *cestuis que trustent* upon the petition (*o*), by virtue of the 15 & 16 Vict. c. 86, s. 42, r. 9.

Shares settled.

The old trustee, unless he is out of the jurisdiction, should be served (*p*). The consolidated orders in Chancery require a note to be appended to the petition specifying the persons upon whom it is intended to be served, and this note would be convenient as a guide for the registrar in the County Courts.

Old trustee.

Service note.

Evidence.] The 40th section of the Trustee Act, 1850, provides that the person entitled to apply for an order may give evidence by affidavit *or otherwise* in support of his petition, but, notwithstanding the latitude thus allowed, the Court of Chancery always requires the statements of the petition to be verified by affidavit; and by the Order XI., rule 8, this is to be the practice of the County Court, unless the judge otherwise directs. It is not requisite that the devolution of the beneficial title should be strictly proved by means of baptismal and other certificates, but the affidavit of a competent person, acquainted with the facts, will be accepted as sufficient (*q*).

Title of beneficiaries need not be strictly proved.

Amendment.] A petition may be amended by leave of the Court, which orders the hearing to stand over for the purpose of such amendment. It has sometimes been amended at the hearing (*r*), but it will not be amended after the order has been drawn up.

(*n*) By virtue of the 15 & 16 Vict. c. 86, s. 51; see *Re* Sharpley's Trusts, 1 W. R. 271.
(*o*) *Re* Smyth's Settlement, 2 D. G. & Sm. 781.
(*p*) *Re* Maynard, 16 Jur. 1084.
(*q*) *Re* Hoskins, 4 D. G. & J. 436.
(*r*) Matson v. Swift, 8 Beav. 368.

The judge of the County Court has all the powers and authorities of a judge of the Court of Chancery to direct the amendment of the petition at or during the hearing, and before a final order has been made. (Order XIII., r. 1. See *supra*, p. 20.)

Order.] For forms of orders which are adapted to all the sections of the Trustee Act and the Trustee Extension Act, except those which are applicable to lunatic trustees or mortgagees, see Tripp's Chancery Forms, pp. 212, *et seq.* Where an order has been obtained upon a statement of facts which is untrue, the order will be discharged as irregular (*s*).

Discharge of order.

Costs.] Where the application is for the general benefit of all the parties interested, the costs as between solicitor and client will fall upon the estate (*t*); and where new trustees are appointed, they are in general directed to raise and pay them. Where a person having only a partial interest applies for his own benefit, he must bear the costs of the application. The petition should ask only for payment of the costs of the application, and not of the costs "incidental to or consequent thereon," as these words give rise to uncertainty (*u*). As to the costs of respondents, generally, see *supra*, p. 274.

Costs of petition for benefit of all parties come out of the estate.

Secus, if petitioner has only partial interest.

What costs allowed.

The Court has no jurisdiction under the Trustee Acts to award costs adversely against persons cited to appear as respondents who are mere strangers to the trust (*v*), even though their misconduct may have necessitated the application. The jurisdiction as to costs is far more ample under the Trustees Relief Act, 10 & 11 Vict. c. 96. See *supra*, pp. 271, 272.

Respondents cannot be made to pay costs.

(*s*) Brignall v. Whitehead, 10 W. R. 69; In *Re* Havelock's Trusts, 35 L. J. Ch. N. S. 228, a supplemental order was made.
(*t*) *Re* Fellow's Settlement, 2 Jur. N. S. 62.
(*u*) *Re* Fellow's Settlement (*loc. cit.*)
(*v*) *Re* Primrose, 23 Beav. 399.

CHAPTER VIII.

MAINTENANCE AND ADVANCEMENT, AND LAW OF INFANTS GENERALLY.

Jurisdiction, &c. . . . 294
General Principles relating to Infants 295
Maintenance and Advancement 297
Mode of Application . . 297
Form of Petition . 298
Maintenance by Statute . 298
Maintenance independent of Statute 299
Advancement . . . 301
Legacy to Infant payable at future time 302

Jurisdiction, &c.] The 28 & 29 Vict. c. 99, enacts (*a*), that the Court shall have and exercise all the power and authority of the High Court of Chancery in (*b*) all proceedings relating to the maintenance and advancement of infants, in which the property of the infant shall not exceed in amount or value the sum of £500. The judge of a County Court has, in such a case, in addition to the powers and authorities already possessed by him, all the powers and authorities for the purposes of the Act of a judge of the High Court of Chancery (*c*).

As no special provision is made as to the Court in which the proceedings are to be instituted, the proper forum must be determined by the last clause (*d*) of the 10th section, and it will be the Court of the district in which the respondents (*e*), or one of the respondents if there are several, reside or carry on business.

The mode of proceeding is by petition.

(*a*) Section 1. (*b*) Clause 6.
(*c*) Section 2. (*d*) Clause 6.
(*e*) *Supra*, p. 19.

General principles relative to infants.] Before considering the special subject of this clause it will be desirable to refer to the general principles upon which the jurisdiction of the Court of Chancery over the persons and estates of infants is founded, and to point out how far these principles will be acted upon in the County Courts.

Infant party to a suit or proceeding in Chancery generally becomes a ward of Court.

Formerly any bill, provided it were for the direction of the Court in relation to the person or estate of an infant, and for his benefit, made the infant, immediately on filing, a ward in Chancery (*f*). In modern times any bill by which an infant's property is administered on its filing makes the infant a ward. In some cases petitions and other proceedings have the same effect (*g*) and so has service of a decree under the 15 & 16 Vict. c. 86, s. 42. It is doubtful whether a petition filed in a County Court under the 6th clause will make the infant a ward of the County Court, although the Act gives to the County Court all the power and authority of the Court of Chancery in certain suits and proceedings, and it will not be safe to assume that the County Court has more than jurisdiction in relation to the specific questions of the maintenance and advancement of the infant. At the same time the question, how a County Court, in administering estates or executing trusts, is to deal with the shares of beneficiaries who are infants is one of considerable difficulty, and as such infants may possibly be held to be wards of the County Court a few observations may be here made as to the principles and practice of the Court of Chancery in relation to wards of Court.

Whether an infant will in any case become a ward of the County Court, *Quære.*

Custody of wards and management of their property.

When an infant has been constituted a ward of Court, a guardian of his person may be appointed on petition, and the infant may be removed from the control of his testamentary or other guardian, or even of his parents, if his benefit absolutely

(*f*) Butler v. Freeman, Amb. 303; Hughes v. Science, 6 Serjt. Hill's MSS. 8.

(*g*) *Re* Hodge's Settlement, 3 K. & J. 213; Stuart v. Moore, 9 H. L. 440.

require such a course (*h*). But a very strong case is necessary to induce the Court to remove children from the care of their parents (*k*). It is the duty of the guardian from time to time to apply to the Court, if the benefit of the infant requires it, as, for instance, if he has got into difficulties through extravagant habits (*l*).

The Court will also, but only on bill filed (*m*), appoint a receiver and manager of the infant's property,—in general, not the same person as the guardian, and in a proper case direct the yearly rents, or a sufficient part, to be paid to the guardian for maintenance and education, and the rest to be accumulated for the infant's benefit.

Taking wards abroad, or procuring their marriage.

Wards of Court must not be taken abroad (*n*) or marry without the consent of the Court (*o*). Persons removing a ward out of the country, and persons marrying a ward without leave, as well as all persons concerned or assisting, are guilty of a contempt of Court, whether they know the infant is a ward or not (*p*). A petition must therefore be presented for leave for a ward to marry, which will only be granted if the marriage is suitable and a proper settlement is proposed. As to the nature of the settlement, see Dav. Prec., vol. iii., p. 735 note.

Where a female ward is knowingly married without leave, the husband will be committed to prison (*q*), and only discharged upon his making a proper settlement, which in such a case is framed so as to exclude the husband from all marital estate and interest, unless a different course would be clearly for the infant's benefit (*r*).

(*h*) Wellesley v. Duke of Beaufort, 2 Russ. 1; Shelley v. Westbrooke, Jac. 266 n.

(*k*) Ball v. Ball, 2 Sim. 35.

(*l*) Kay v. Johnstone, 21 Beav. 538.

(*m*) *Ex parte* Mountfort, 15 Ves. 445.

(*n*) De Manneville v. De Manneville, 10 Ves. 52.

(*o*) Hughes v. Science (*loc. cit.*); Warter v. Yorke, 19 Ves. 453.

(*p*) Herbert's case, 3 P. Wms. 116; Biddles v. Jackson, 3 De G. & Jo. 544; 26 Beav. 282.

(*q*) *Ex parte* Mitchell, 2 Atk. 173; Ball v. Coutts, 1 V. & B. 302.

(*r*) Wade v. Hopkinson, 19 Beav. 613, 619.

Under the 18 & 19 Vict. c. 43, an infant ward can, if a male at twenty, and if a female at seventeen, make a binding settlement on marriage (*s*).

Settlement for the purpose of making infant a ward.

On account of the efficacy of the control exercised by the Court of Chancery, a settlement is sometimes made upon an infant, in order that a suit may be instituted and the infant made a ward of Court. £100 is a sufficient sum for the purpose.

Whether infant's whole property must be under £500.

Maintenance and advancement.] If the infant does not become a ward of the County Court by an application under the 6th clause, the clause may be held to mean that only the property out of which the maintenance or advancement is to be made is required not to exceed £500, in order to give the County Court jurisdiction; and the form of petition (Form X.) not stating that the whole property of the infant is under £500 supports this view. If the infant is, by such an application, made a ward of the County Court, as it is a rule of the Court of Chancery that the Court has jurisdiction over the whole property of its ward, the County Court will be bound to exercise jurisdiction over the whole property of the infant, and therefore unless the whole property is under £500 it cannot exercise jurisdiction at all.

Petition.

Mode of application.] The Court of Chancery can allow maintenance for an infant, or make provision for his advancement, out of his property, whether legal or equitable, upon petition or summons in chambers. In the County Court such applications must be made by petition.

Who should be petitioners and who respondents.

The petition may be presented by the guardian and served upon the infant, in which case another guardian *ad litem* must be appointed; or it may be presented by the infant by his next friend and served upon the guardian, or upon the trustee in whom the property is vested.

In these cases the petition must, by s. 10, cl. 6, be presented to the County Court of a district in

(*s*) See further as to this Act, p. 302.

Where there is no guardian or trustee.

which one of the respondents resides or carries on business. Where, however, the infant has the legal estate, but has no guardian either in socage or by election, or under the statute of Charles the Second (*t*), and none has been appointed by the Court of Chancery, there is some difficulty in determining the proper County Court to proceed in, as there will be no respondent to the petition. Perhaps the better course in such a case will be first of all to obtain the appointment of a guardian by the Court of Chancery on an application at chambers, and then to serve him with the petition.

Form of petition.] The petition should state the infant's age, the nature and amount of his fortune, and what relations he has. Where the detail is not lengthy it should state the nature and occasion of the expense intended to be incurred, and where the application is for maintenance a short scheme should be submitted. This course will enable the judge to make an immediate order; but if it is not possible to adopt it a reference to the registrar and proper inquiries can be directed. This is generally done where an allowance for past maintenance is asked for. The order on the petition should, in all cases where the full amount of the income is not granted, reserve liberty to apply, as an increased allowance may at a subsequent period be required.

Lord Cranworth's Act.

Maintenance by statute.] By the 23 & 24 Vict. c. 145, s. 26, it is provided that in all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardian (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in

(*t*) 12 Car. 2, c. 24.

respect of such property, whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen. Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

By the 32nd section of 11 Geo. 4 & 1 W. 4, c. 65, the Court of Chancery may on petition order the dividends of stock belonging to an infant to be applied to his maintenance. This enactment is given in the Appendix, Part II. 11 G. 4, c. 65.

Maintenance independently of statute.] Maintenance may be allowed out of any property to which an infant is absolutely entitled, though unascertained, if a minimum can be fixed (*u*). And besides cases of parental gifts, maintenance is sometimes allowed where the interest of the infant is contingent or is liable to be divested (*v*). Thus, if there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation, to be paid at twenty-one, with survivorship in case of the death of any under that age to the others,—each having a like chance of taking the whole by survivorship, the Court takes the fund which belongs to all, and must go to all or to some of them, and maintains them all out of the interest (*w*). But if there is a gift over to a stranger, maintenance cannot be allowed (*x*), unless with the consent of the

Out of what property maintenance will be given.

Maintenance on principle of compensation.

(*u*) Warter v. ———, 13 Ves. 92.
(*v*) See Prater v. Prater, 6 L. J. Ch. 90.
(*w*) Greenwell v. Greenwell, 5 Ves. 194.
(*x*) *Ex parte* Kebble, 11 Ves. 604.

stranger (*y*). And for a similar reason it is not granted where there is a gift over to the issue of the children, or to others not *in esse*.

In the cases above referred to, the whole interest may be applied towards maintenance, even although the testator has expressly directed it to be accumulated, or has dedicated a part only of the interest to that purpose (*z*).

Two funds applicable.

Where there are two funds absolutely given for the maintenance of an infant, and both are not required, the interest of the infant must determine which of the two is to be applied. Thus, if the first fund is given absolutely to the infant, while he is only entitled to maintenance out of the second fund, which, subject to that liability, is given to another, the infant must be maintained out of the second fund (*a*).

Father must maintain if of ability.

A father is bound to maintain his legitimate children, and therefore where the father is alive maintenance is not allowed out of the infant's property, unless it appear that the father is not of ability to maintain and educate him in a manner suitable to his expectations (*b*). But this does not apply if upon the marriage certain property is expressly devoted to the maintenance of the children, for in such a case the father is entitled to have the settlement carried out on the ground of contract, and without any reference to his ability (*c*). But where the fund comes of mere bounty, the father, if of ability, must maintain, notwithstanding an express provision for that purpose (*d*). And it seems that the rule applies whether the accumulated interest will go to the infant or to a stranger (*e*).

Exception.

(*y*) Cavendish v. Mercer, 5 Ves. 195, n.

(*z*) Stretch v. Watking, 1 Mad. 253; Evans v. Massey, 1 Y. & G. 196.

(*a*) Foljambe v. Willoughby, 1 S. & S. 165.

(*b*) Butler v. Butler, 3 Atk. 60; Fawkner v. Watts, 3 Atk. 408; Buckworth v. Buckworth, 1 Cox, 80.

(*c*) Meacher v. Young, 2 M. & K. 490.

(*d*) Hamley v. Gilbert, Jac. 354.

(*e*) Hughes v. Hughes, 1 Bro. C. C. 387; Livesey v. Livesey, 3 Russ. 287.

A mother is not bound, independently of the poor law, to maintain her legitimate children, and therefore no evidence need be adduced of her inability to do so (*f*). Mother is not bound to maintain.

Maintenance for the time past will in general be allowed, so far as expense has been actually incurred, but not to a greater amount than the interest of the child's fortune. And a mother will not be put to strict proof of her expenditure. But a father, even though not of ability, cannot receive a sum for past maintenance, unless there were special circumstances excusing his not applying to the Court before the expense was incurred (*g*). Past maintenance.

Sometimes a larger allowance for maintenance is made than the infant personally requires, the Court considering it to be for his benefit that some other member of his family should be provided for by this means (*h*). Larger allowance in consideration of rest of the family.

The Court will, in case of need, break in upon the capital of the fund for maintenance where such a course is clearly for the infant's benefit (*h*); but a trustee should not do so without the express sanction of the Court, which may be signified on an application under Lord St. Leonards' Act (*l*). A trustee is, however, always justified in applying the whole or a competent part of the income of an infant's property towards his maintenance and education. As, however, he must, in the absence of an express power, or unless sect. 26 of 23 & 24 Vict. c. 145 (*m*) applies, see to the application of the money so appropriated, an application to the Court may often be advisable. Such an application may be made under Lord St. Leonards' Act (*l*). Breaking in upon capital.

Advancement.] Advancement is not a term having any precise legal signification, but it is

(*f*) See Douglas v. Andrews, 12 Beav. 310.
(*g*) Carmichael v. Hughes, 20 L. J. Ch. 396.
(*h*) Heysham v. Heysham, 1 Cox, 179; Allen v. Coster, Beav. 202.
(*k*) *Ex parte* Green, 1 Jac. & W. 253.
(*l*) See *supra*, p. 274.
(*m*) See *supra*, p. 298.

generally used in reference to some occasion where expense is to be incurred once for all, *e. g.*, binding an infant apprentice, providing him with an outfit on his going to sea, &c. So also providing a female infant with a portion on marriage is a mode of advancement (*l*); and hence it seems that the County Court has jurisdiction to enable an infant whose whole fortune is under £500 to make a binding settlement on marriage under the 18 & 19 Vict. c. 43. (See App. Part II.)

Portion on marriage.

Legacy to infant payable at future time.] We have already (*m*) had occasion to refer to the rule, that where a legacy is given to an infant by a parent or person *in loco parentis*, payable at a future time, there is an implied gift of interest in the meantime. If the testator has made a provision for maintaining the infant up to an age short of the time when the legacy is payable, interest is allowed during the remainder of the infant's minority (*n*).

(*l*) Lloyd v. Cocker, 27 Beav. 645.
(*m*) *Supra*, p. 87.
(*n*) Chambers v. Goldwin, 11 Ves. 1; Martin v. Martin, 1 Law ep. Eq. 369, overruling Kime v. Welfitt, 3 Sim. 533.

CHAPTER IX.

PARTNERSHIP.

Jurisdiction 303
Partnership, what ? . . 304
Consequences of Partnership . 305
Socius mei socii meus socius non est 307
Extra-judicial Dissolution . 307
Expulsion Clauses . . . 309
Partnership continued after Term fixed by Articles has expired 309
Dissolution by Decree . . 310
Impossibility of carrying on Business at a Profit . . 310
Loss of Mutual Confidence . 310
Insanity of a Partner . . 311
Partnership induced by Fraud 312
Decree 313
Suit for Dissolution, or for Winding-up and Dissolution.
Who may be Plaintiffs . . 314
Who should be Defendants . 314
Defences 315
Denial of Partnership . . 315
Statute of Limitations . . 315
Interlocutory Applications . 315
Injunction 316
Receiver 317
Payment into Court . . 318
Decree 318
Joint and Separate Estate . 319
Accounts as between the Firm and its Members . . 323
Contribution to Losses . . 323
Allowances for Trouble, &c . 324
Interest 324
Return of Premiums . . 325
Other Points connected with Accounts . . . 325
Mode of realizing Assets . . 326
Final Decree 329
Costs 329

Jurisdiction, &c.] The 28 & 29 Vict. c. 99 enacts (*a*), that the County Courts shall have all the power and authority of the High Court of Chancery, in all suits for the dissolution or winding-up of any partnership in which the whole of the *property, stock and credits* of such partnership shall not exceed £500 in amount or value. By s. 1, r. 8, the Court is empowered to grant orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction in equity is given to the County Court.

By s. 10, r. 4, proceedings in partnership cases are to be taken in the County Court within the

(*a*) Sect. 1, r. 7.

district of which the partnership business was or is carried on.

As to the place where a business is to be considered as carried on, see Davis, p. 22.

Partnership the result of an agreement to share profits *and* losses,

Partnership, what?] Partnership is the result of an agreement to share profits and losses, either in some continuing business or in one single venture, as in sending out a whaler (*a*).

and generally, but not necessarily, of an agreement to share profits only.

An agreement to share profits *primâ facie*, but not necessarily, imports an agreement to share losses, and thus *primâ facie* makes the contracting parties partners. But if the terms or the nature of the agreement shew that it was not the intention of the parties to become partners, as where a clerk receives a salary proportionate to profits, no partnership arises (*b*). This principle, as settled by the latest authorities, is perhaps restricted rather than extended by a recent Act. The 28 & 29 Vict. c. 86 (*bb*) enacts as follows:—

Sect. 1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such.

Sect. 2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Sect. 3. No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason

(*a*) Brett v. Beckwith, 3 Jur. N. S. 31.

(*b*) *Re* English and Irish Church and University Assurance Society, 1 H. & M. 85; and Bullen v. Sharpe, 1 Law Rep. C. P. 86; following Cox v. Hickman, 8 H. of L. 268.

(*bb*) See App. Part II.

only of such receipt, be deemed to be partner of, or subject to any liabilities incurred by, such trader.

Sect. 4. No person receiving, by way of annuity or otherwise, a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

Sect. 5 postpones the claims of a lender under sect. 1 to those of all other creditors in the event of the borrower's insolvency.

Sect. 6. In the construction of this Act the word "person" shall include a partnership firm, a joint stock company, and a corporation.

It is quite competent for partners to stipulate, as between themselves, that one or more shall bear all the risk to the exclusion of the others (*c*). There is no presumption of partnership arising from an agreement to share gross returns (*d*). Persons who club together their money in order to make a larger purchase of property, which is to be divided between them or enjoyed in common, and other co-owners, are not as such co-partners (*e*). Nor do they become such merely by sharing the fruits of the property. Thus, two co-tenants of a house dividing the rent do not become partners, although they contribute to the repairs, &c. *pro ratâ* (*f*).

Agreement to share gross returns does not constitute a partnership.

Co-owners not co-partners.

In concerns of any magnitude there is in general no question as to the fact of a partnership, and it is usually regulated by an agreement embodied in partnership articles.

Consequences of partnership.] The effect of the partnership contract is to make each partner the agent of all the other partners in all matters necessary for the transaction of the partnership

Agency of partners for each other.

(*c*) See Bond v. Pittard, 3 Mee. & W. 357; Geddes v. Wallace, 2 Bll. 270.
(*d*) Dry v. Boswell, 1 Camp. 330.
(*e*) Kay v. Johnston, 21 Beav. 536.
(*f*) French v. Styring, 2 C. B. N. S. 357; see per Willes, J.

business in the way in which businesses of the kind are usually carried on (*g*). As between themselves the exercise of this power may be restrained by agreement. But a stranger will not be affected by such restriction, unless he has notice of it. This implied authority, however, extends only to such acts as are necessary for the conduct of the business under ordinary circumstances; it is not sufficient that the act of a partner is beneficial, or even that under the extraordinary circumstances of a given case it was necessary (*h*). And even where the act comes within the general scope of the implied authority, a stranger will be bound by an actual want of authority if the nature of the transaction was such as would have raised a suspicion in the mind of a man of ordinary prudence. Thus, if the business of a firm be such as ordinarily requires bills of exchange, one partner may draw, accept and indorse bills in the name of the partnership for partnership purposes. But such a bill, if applied by one of the partners in discharge of his own private debt, would be invalid, unless evidence of express authority was forthcoming (*k*). So also, if the business of the firm did not ordinarily require bills, as in the case of a firm of solicitors (*l*). Again, one partner can in general pledge the credit of the firm for goods supplied (*m*), draw cheques in its name (*n*), receive or release debts due to the firm (*o*), and pledge partnership goods for partnership purposes (*p*).

Where stranger affected by want of authority.

Drawing, &c., bills in name of firm.

One of several co-owners

Co-owners are not in general agents one for the other (*q*). Payment, however, to one of several

(*g*) Lindley, p. 192.
(*h*) See Brettel v. Williams, 4 Ex. 630.
(*k*) *Re* Riches, 5 N. R. 287.
(*l*) Hedley v. Bainbridge, 3 Q. B. 316.
(*m*) Tredwen v. Bourne, 6 M. & W. 461.
(*n*) Laws v. Rand, 4 Jur. N. S. 74.
(*o*) Hawkshaw v. Parkins, 2 Sw. 569; Henderson v. Wild, 2 Camp. 561.
(*p*) *Ex parte* Bonbonus, 8 Ves. 540.
(*q*) Cottam v. Eastern Counties Railway Company, 1 Jo. & H. 243; Barton v. Williams, 5 B. & A. 395; Helme v. Smith, 7 Bing. 709.

co-owners or co-trustees is payment to all, unless the person paying has received notice not to pay on the receipt of one alone (*r*). may receive rent, &c.

"*Socius mei socii meus socius non est.*"] The contract of partnership is a personal contract or, in other words, a contract founded on a *delectus personæ*, so that, if A. and B. are partners, A. cannot so assign his share and interest in the business to C. as to make C. a partner with B. against B.'s will. A. may indeed agree to share his proportion of the profits with C., or even to hand them over entire to C., but in neither case is there any privity between C. and B.—a result neatly expressed by the maxim, "*Socius mei socii meus socius non est.*" Partnership contract founded on *delectus personæ*.

Indeed, this principle is carried so far, that by the common law it is not even competent for persons entering into a partnership to stipulate that their shares shall be assignable, and a partnership pretending to be regulated by such a principle is at common law wholly illegal (*s*). A stipulation that the liability of the partners shall be limited to a certain amount is not illegal, but, except perhaps as against persons having notice, it is nugatory (*t*). Joint stock company impossible under common law.

In consequence of these two principles, a joint stock company was formerly only possible under a charter of incorporation or a special Act of Parliament. But this state of things is now altered.

DISSOLUTION OF PARTNERSHIP.

Extra-judicial dissolution.] A partnership not entered into for any fixed term may, in the absence of agreement to the contrary, be dissolved at the will of any one of the partners. No agreement to the contrary will be inferred from the fact of the firm having incurred debts (*u*), or Partnership not for fixed term,

(*r*) Harrison v. Barnby, 5 T. R. 279; Husband v. Davis, 10 C. B. 645.

(*s*) Blundell v. Winsor, 8 Sim. 601.

(*t*) Walburn v. Ingilby, 1 My. & Kee. 61.

(*u*) King v. Accumulative Insurance Society, 3 C. B. N. S. 151.

or continued after expiration of term, dissoluble by any partner by notice.

having taken a lease for a certain term (*v*). So also if partners originally for a fixed term continue after the expiration to carry on business as partners, any one of them may dissolve when he pleases. If a partner for a fixed term enter into a sub-partnership, there is no implied agreement that the sub-partnership shall last till the principal partnership is dissolved (*w*).

Requisites of notice.

A notice of intention to dissolve must be given even where the term originally agreed upon has expired (*x*). Such notice must be unequivocal, and communicated to all the partners (*y*). It is conceived that conduct clearly inconsistent with an intention to continue a partner is equivalent to notice.

Effect of notice.

After due notice to dissolve, the partnership continues so far as is necessary to wind up its affairs (*z*).

Partnership dissolved *ipso facto* by one partner alienating his share.

A partnership, whether originally constituted for a term or not, is, unless the contrary be provided, dissolved *ipso facto* by one partner alienating his interest, either voluntarily as by assignment (*a*), or marriage of a *feme sole* (*b*), or involuntarily as by death (*c*), or bankruptcy (*d*).

Solicitor partner misappropriating trust funds

Where one of two solicitors, co-partners, fraudulently appropriated trust funds to his own use, it was held that the other might dissolve *instanter* by notice (*e*).

Lunacy of partner.

Lunacy does not enable the sane partners to dissolve extra-judicially (*f*), but notice of intention to dissolve may be well served upon a lunatic (*g*).

(*v*) Crawshay v. Maule, 1 Sw. 509; Featherstonhaugh v. Fenwick, 17 Ves. 307.
(*w*) Frost v. Moulton, 21 Beav. 596.
(*x*) Parsons v. Hayward, 31 L. J. Ch. 666.
(*y*) Van Sandau v. Moore, 1 Russ. 463.
(*z*) Parson v. Hayward, 31 Beav. 199, Lindley, 179.
(*a*) Heath v. Sansom, 4 B. & Ad. 175.
(*b*) Nerot v. Burnand, 4 Russ. 247.
(*c*) Vulliamy v. Noble, 3 Mer. 614.
(*d*) *Ex parte* Williams, 11 Ves. 5.
(*e*) Essell v. Hayward, 30 Beav. 158.
(*f*) Anon., 2 K. & J. 441.
(*g*) Robertson v. Lockie, 15 Sim. 285; Mellersh v. Keen, 27 Beav. 236.

In the absence of agreement, one partner cannot retire or be expelled, except by a general dissolution where that is competent. Articles of partnership frequently enable a partner to retire after notice upon specified terms. If the co-partners have an option given them of purchasing the retiring partner's share, and declare their intention to do so, the retiring partner cannot thereupon withdraw his notice and dissolve under some other clause in the deed (*h*). Retirement and dissolution.

Expulsion clauses.] Clauses enabling one or more of the partners to expel a co-partner are strictly construed, nor will the Court allow them to be acted upon where the expulsion appears to be prompted by private spite or some other improper motive, and not by circumstances which the partners acting *bonâ fide* might think to require it (*k*).

Partnership continued after term fixed by articles has expired.] If a partnership which, according to the articles, is to last for a given time is carried on beyond that time without any express renewal, it becomes a partnership at will, subject, however, to such of the provisions of the articles as are applicable to the new partnership. Thus, provisions as to the mode of carrying on the business, winding up, &c., continue in force. Where articles of partnership for seven years provided that a partner, upon certain specified conduct of his co-partner, should have power to dissolve by notice, and that thereupon the defaulting partner should be considered as quitting the business for the benefit of the other partner, this stipulation was held not applicable when the partnership was continued after the seven years had expired (*l*).

(*h*) Warder v. Stilwell, 3 Jur. N. S. 9.
(*k*) Blisset v. Daniel, 10 Hare, 493; see also Smith v. Mules, 9 Ha. 556.
(*l*) Clark v. Leach, 1 De G. J. & Sm. 409, 32 Beav. 14.

DISSOLUTION BY DECREE.

Under what circumstances the Court will dissolve a partnership though the term agreed upon has not expired.

A partnership for a definite period can be dissolved before the expiration of the period only by decree of a Court of Equity. Such relief is granted upon proof of special circumstances, rendering the continuance of the partnership, or the attainment of the end for which it was constituted, morally impossible (*m*).

Impossibility of carrying on business at a profit.] Where the agreed upon capital has all been paid and applied towards carrying on the concern, and the concern will not yield a profit without additional capital, which none of the partners are prepared to advance, the Court will dissolve the partnership, even although it may be unembarrassed (*n*). And in a case where the firm was insolvent, and its affairs were daily becoming worse without any prospect of improvement, the Court, *upon motion*, made an order appointing a person to sell the business, collect the debts, and satisfy the demands on the firm (*o*).

Loss of mutual confidence.] Where partners who are so by contract for a fixed period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will of its own authority dissolve the partnership, even against the will of one of the partners (*p*), and even although the conduct of the plaintiff may not be wholly free from blame (*q*).

Equity, however, will not allow one partner to

(*m*) See Warner v. Cunningham, 3 Dow. 76; Harrison v Tennant, 21 Beav. 482; *In re* The Electric Telegraph Company o Ireland, 22 Beav. 471.

(*n*) Jennings v. Baddeley, 3 K. & J. 78; Baring v. Dix, Cox, 213.

(*o*) Bailey v. Ford, 13 Sim. 495.

(*p*) Goodman v. Whitcomb, 1 Jac. & W. 592; De Berenger v Hammel, Jarman's Byth. vol. 7, p. 83.

(*q*) Baxter v. West, 1 Dr. 173; Watney v. Wells, 30 Beav. 56

obtain a dissolution for reasons based entirely on his own misconduct (*r*).

Insanity of a partner.] The insanity of a partner is not in itself a dissolution, but it may induce the Court to decree a dissolution. In a disputed case such a decree will not be made, even where it is proved that the partner has been insane, without an inquiry whether at the time when the relief is sought he is "in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the partnership articles" (*Anon.* 2 K. & J. 441, 449), unless he has been found a lunatic by inquisition. The affirmative of the issue would, it seems, lie on the partner who had been of unsound mind. This rule applies to a mining concern (*s*).

Fact of insanity disputed.

In all the cases above referred to the sane partners were plaintiffs. It is conceived that a lunatic partner cannot dissolve against the will of his sane co-partners.

Lunatic partner plaintiff.

The dissolution will be from the date of the decree (*t*).

Time of dissolution.

The 16 & 17 Vict. c. 70, s. 123, enacts that where a person being a member of a co-partnership firm becomes lunatic, the Lord Chancellor, intrusted, &c., may, by order made on the application of the partner or partners of the lunatic, or of such other person or persons, as the Lord Chancellor, intrusted, &c., shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the Court of Chancery, or otherwise by due course of law, the committee of the estate, in the name and on behalf of the lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons,

(*r*) See Harrison v. Tennant, 21 Beav. 482; Fairthorne v. Weston, 3 Ha. 387.
(*s*) Rowland v. Evans, 30 Beav. 302.
(*t*) Jones v. Welch, 1 K. & J. 765.

upon such terms and in such manner, and may and shall execute and do such conveyances and things for effectuating this present provision, and apply the monies payable to the lunatic in respect of his share and interest in the co-partnership in such manner, as the Lord Chancellor, intrusted, &c., shall order.

Partnership induced by fraud.] Where a person is induced to become a partner with another by false statements as to material facts made to him by that other, and on which he relies, he is entitled on discovering the falsity of such statements to disaffirm the contract, to recover back any money he may have paid under it with interest, and to be indemnified against all outstanding debts and liabilities of the partnership (*u*). The fraud must indeed be such as *locum dat contractui* (*v*); but, on the other hand, if the plaintiff were in fact deceived by a statement not at first sight manifestly untrue, the defendant will not be heard to say that the plaintiff, if he had been more diligent and careful, might have discovered that the representation made to him was false (*w*). And the defendant cannot excuse himself by saying that he himself believed the representation to be true, where it relates to a matter as to which he has the means of knowing the real truth (*x*).

Lapse of time.

It is difficult to say that any lapse of time will bar a plaintiff of his right to be relieved against a fraud, provided he be prompt in claiming redress as soon as the fraud discloses itself (*y*).

Costs.

The defendant in such cases pays the costs of the suit; and solicitors or agents aiding or concurring

(*u*) Pillans v. Harkness, Colles, 442; Rawlins v. Wickham, 1 Giff. 355, 3 De G. & Jo. 304; see *supra*, p. 242.

(*v*) Pulsford v. Richards, 17 Beav. 87; Jennings v. Broughton, 17 Beav. 234, 5 De G. M. & G. 126.

(*w*) Rawlins v. Wickham, (*loc. cit.*)

(*x*) Burrowes v. Lock, 10 Ves. 470.

(*y*) See *Re* The Agriculturist Insurance Company, 5 N. R. 385: and observe *supra*, p. 259.

n a fraud may be made defendants, although costs only are prayed against them (*z*).

Solicitors, agents, &c., concurring in a fraud.

It is probable that the absence of all power in the County Court to compel discovery, and the fact that the plaintiff cannot from time to time amend his plaint, will render the jurisdiction too feeble to grapple with cases of concealment and fraud, and that the Court of Chancery will generally be appealed to in such cases.

The following minutes of decree are adapted to such a case:—

Decree where dissolution granted on ground of fraud.] "This Court doth declare that the partnership entered into by the deed dated the 1st of May, 1850, is void and invalid as between the parties thereto, and that the said deed ought to be set aside, and decree accordingly, &c.

"Declare that the defendant B. and the estate of J. W., deceased [*one of the parties to the fraud*], are bound to repay the plaintiff R. the sum of £2500, paid by him as consideration for a share in the business, with interest thereon at £4 per cent., from the date of the deed. Declare that the defendant B. and the estate of W. are bound to indemnify the plaintiff against all the outstanding debts, sums of money and liabilities to which the plaintiff has or may become subject and liable to pay in respect of the partnership dealings, &c., of the alleged partnership or in relation thereto: and it is ordered that the following accounts and inquiries be taken.

"First, an account of the outstanding debts and liabilities, &c.

"Secondly, an account of what is due to plaintiff in respect of the sum of £2500 and interest.

"Thirdly, an account of all sums, &c., paid by plaintiff in respect of partnership debts, &c., with interest at £4 per cent. from the day of payment;

(*z*) Le Texier v. Margravine of Anspach, 15 Ves. 159; Marshall v. Sladden, 7 Ha. 428; Prideaux v. Lonsdale, 1 De G. & Jo. 433.

and in taking such account the plaintiff to give credit for all profits drawn by him, &c., with interest at £4 per cent.; [and the defendants, the executors, not admitting assets sufficient, &c., it is ordered that the plaintiff be at liberty to go in under the decree in G. *v.* W. (*a suit to administer the estate of J. W.*).] That the receiver be continued and to pay the balance into Court. Adjourn further consideration. Liberty to apply." (*Rawlins* v. *Wickham*, 1 Giff. 362.)

SUIT FOR DISSOLUTION, OR FOR WINDING UP AND DISSOLUTION.

Who may be plaintiff.] A suit to dissolve an existing partnership can only be instituted by one of the partners; but where a dissolution has taken place a suit for winding up, taking accounts, &c., may be instituted by any one claiming under a partner, *e. g.*, a purchaser of his share, executors, assignees in bankruptcy, &c.

All the partners must be parties. Representatives of deceased partners.

Who should be defendants.] All the partners must be parties to the suit, and the representatives of the deceased partners if they have any interest in taking the account (*a*). Where there is difficulty or impossibility in obtaining the appointment of an administrator, either general or *ad litem* (*b*) only, the Court can appoint a person to represent the estate of a deceased partner (*c*).

A stranger should not generally be a defendant.

A stranger should not be a party unless he is in possession of some part of the partnership assets and an injunction is prayed against him. Thus the Bank of England is sometimes a proper party, if the suit seeks to restrain the transfer of stock (*d*).

(*a*) Lindley, 771.
(*b*) See 20 & 21 Vict. c. 77, s. 70.
(*c*) 15 & 16 Vict. c. 86, s. 44; Cawthorn v. Chalié, 2 Sim. & Stu. 127.
(*d*) See Vulliamy v. Noble, 3 Mer. 593.

DEFENCES TO THE SUIT.

Denial of partnership.] If the plaintiff is not a partner at all, this fact is of itself sufficient to bar his claim (*e*). The County Courts, in administering equity, will not be embarrassed by the technical difficulties attending a *plea* in the Court of Chancery, and a trader who finds himself attacked by a person claiming to be a partner will be entitled to have the question of partnership or no partnership decided before he can be required to set out accounts relating to his business (*f*).

Action of account to be commenced within six years.

Statute of Limitations.] The old Statute of Limitation, 21 Jac. 1, c. 16, s. 3, as amended by 19 & 20 Vict. c. 97, s. 9, enacts that all actions of account shall be commenced within six years next after the cause of such action or suit.

A Court of Equity is bound by the statute (*g*). It is therefore a good plea in defence to a prayer for an account of certain dealings and transactions, that none of such dealings or transactions occurred within six years before the commencement of the suit (*h*). An acknowledgment of the existence of an unsettled account, and a promise to pay the balance, if any should be found due from the party making the acknowledgment, is sufficient to prevent the operation of the statute (*k*).

Statute barred by acknowledgment.

INTERLOCUTORY APPLICATIONS.

It often becomes necessary to call in the aid of the Court to protect, pending the litigation, the business or property of the partnership. This is done by means of an injunction, by the appoint-

(*e*) Drew v. Drew, 2 V. & B. 159.
(*f*) See Lindley, 818.
(*g*) Foley v. Hill, 1 Ph. 399.
(*h*) Martin v. Heathcote, 2 Eden, 169.
(*k*) Prance v. Sympson, Kay, 678.

ment of a receiver and manager, or by ordering money to be paid into Court.

Injunction.] Any one of the partners will be restrained from doing any act which will impede the winding up or injure the property of the firm. Thus a partner has been restrained from forcibly obstructing and interrupting the business, from improperly dismissing servants, from removing books, &c., from the partnership counting-house (*k*), from drawing, accepting, indorsing, or negotiating bills in the name of the firm, and this injunction was extended to a holder who had notice that the bill was improperly drawn (*l*), from getting in debts (*m*), from carrying on the business on his own account pending a winding-up contrary to the articles (*n*). So also a surviving partner may be restrained from wrongfully availing himself of his legal title in the partnership premises (*o*), and conversely the executors of a deceased partner will be so restrained if the legal estate happens to be in them (*p*). But the survivor will not be restrained from carrying on the business in the name of himself and the deceased partner (*q*). Assignees of a bankrupt partner have been restrained from selling the partnership property (*r*), and an injunction was awarded against the sheriff to restrain his taking partnership goods in execution for a debt due from one of the partners who died before the writ was delivered to the sheriff (*s*).

So also one partner will be restrained from divulging trade secrets (*t*), and in case the business is reserved to the other partner from carrying on

(*k*) Charlton v. Poulter, 19 Ves. 148, n.
(*l*) Hood v. Aston, 1 Russ. 412.
(*m*) Read v. Bowers, 4 Bro. C. C. 441.
(*n*) Turner v. Major, 3 Gif. 442.
(*o*) Alder v. Fouracre, 3 Swanst. 489; and Elliot v. Brown, therein cited.
(*p*) Freeland v. Stansfield, 2 Sm. & Gif. 479.
(*q*) Webster v. Webster, 3 Swanst. 490 n.
(*r*) Allen v. Kilbre, 4 Madd. 464; see Frazer v. Kershaw, 2 K. & J. 496.
(*s*) Newell v. Townsend, 6 Sim. 419.
(*t*) Morison v. Moat, 9 Ha. 241.

usiness in such a way as to lead persons to sup-ose that he is the successor of the old firm (*u*), r at all within a certain area, if that be the greement (*v*). Where the nature of the case equires it, the injunction will, at the hearing, be nade perpetual.

Receiver.] A receiver will not be appointed gainst a member of the firm, who has not mis-onducted himself, except under special circum-tances (*w*). But the Court will appoint a receiver vhere a partner has shown himself unfit to be rusted, as if he applies the partnership assets to is own private use (*x*), or refuses to enter his eceipts in the proper books, or wilfully conducts imself in the business in such a manner as to rive away customers, or endanger the assets (*y*), r wrongfully excludes his copartner from a share n the management (*z*). So also in favour of the epresentatives of a deceased partner, where the urvivor insists on carrying on the business with he assets of the deceased (*a*), or colludes with the lebtors of the firm so as to delay getting in the lebts (*b*).

Not generally awarded against a partner who has not misconducted himself.

Although the defendant sets up the defence of he illegality of the partnership, a receiver may e appointed on motion, unless the illegality then ppears indisputably established (*c*).

Where the Court directs the issue of partnership or no partnership to be tried by a jury, a eceiver is not usually appointed before the issue s determined (*d*).

Where the partner actually carrying on the usiness has not so misconducted himself as to ave made him unfit to be trusted, he will

Partner may be appointed receiver.

(*u*) Churton v. Douglas, 1 Johns. 174.
(*v*) Whitaker v. Howe, 3 Beav. 383.
(*w*) See Davis v. Amer, 3 Drew. 64.
(*x*) Harding v. Glover, 18 Ves. 281.
(*y*) See Smith v. Jeyes, 4 Beav. 503.
(*z*) See Wilson v. Greenwood, 1 Swanst. 481.
(*a*) Madgwick v. Wimble, 6 Beav. 495.
(*b*) Eastwick v. Coningsby, 1 Vern. 118.
(*c*) Hale v. Hale, 4 Beav. 369; Sheppard v. Oxenford, 1 K. & J. 491.
(*d*) Peacock v. Peacock, 16 Ves. 49; Chapman v. Beach, 1 J. & W. 494; Fairburn v. Pearson, 2 M. & G. 144.

generally be appointed receiver and manager without a salary (*e*).

Leave is frequently given to each partner to propose himself as receiver (*f*).

Delivery of books to receiver.

Where the receiver has free access to the books, an order for their delivery to him will not in general be made, if it would occasion inconvenience to others entitled to the use of them (*g*).

Payment into Court.] Where the defendant by his answer, or, it is conceived, in the County Courts at the hearing by himself or his counsel, admits that he is indebted to the firm in a sum certain, and does not insist that on the whole account he is a creditor, he may be ordered to pay the money into Court, upon the plaintiff also paying into Court the partnership moneys in his hands (*gg*).

Money obtained in violation of good faith.

And where it appears from the defendant's own statements that the money has been obtained by him in violation of good faith, he must pay it in under any circumstances (*h*).

Liberty to apply as to outstanding debts.

If there are debts outstanding on which the defendant is liable, liberty will be given to him to apply in respect of any payments he may be compelled to make (*k*).

DECREE.

A form of decree applicable to a case of dissolution is given in the schedule No. 25, but it must not be considered that all the directions there inserted can be obtained, as of course. In its simplest form the decree orders an account of all partnership dealings and transactions, as from a given day with just allowances (*l*), and payment of the balance to the party to whom it is due. The account will start from

(*e*) See Wilson v. Greenwood, 1 Swanst. 471.
(*f*) Blakeney v. Dufaur, 15 Beav. 40.
(*g*) Dacie v. Jones, McClel. 206.
(*gg*) Richardson v. The Bank of England, 4 M. & Cr. 165; Mills v. Hanson, 8 Ves. 68
(*h*) Foster v. Donald, 1 J. & W. 252; Jarvis v. White, 6 Ves. 738; Birley v. Kennedy, 6 N. R. 395.
(*k*) Toulmin v. Copeland, 3 Y. & C. 643.
(*l*) See Ord. VI., r. 13.

the last settled account, or from the commencement of the partnership, as the case may be.

If, then, *a* represent the value of the partnership, stock, &c., *b* the debts due to the firm, including debts due from any one of the partners, *c* the liabilities of the firm, including debts due to any partner, the net sum to be divided according to the partnership contract is $a+b-c$. It will be convenient to examine these elements separately.

Joint and separate estate.] By the expression joint estate, joint stock, partnership property, &c., is signified all such property as belongs to all the partners *as such*—the common stock used or intended to be used in carrying out the common object (*m*).

Conversion of separate estate into joint.

Property originally belonging to one of the partners individually may, by express or implied agreement, be converted into partnership property. In a case where a sole trader possessed of stock in trade took two partners who brought in no capital and paid no premium, without any agreement except that they were to participate in the labour and profits of the concern, and he subsequently bought new stock required for the business with his own money, but in the name of the firm, it was held that the stock in trade became joint estate, and that the firm became debtors for the value of the articles thus acquired (*n*).

Things purchased with partnership money.

Where partnership property of one kind is exchanged for property of another kind, as where stock is purchased with partnership money, the things substituted are, as the things parted with were, partnership property, unless it appears from express declarations, or from the circumstances of the case, that the money used in the purchase was ent by the firm to one of the partners. Whether he conveyance is taken in the name of all the

(*m*) Lindley, 545.
(*n*) *Ex parte* Owen, 4 De G. & Sm. 351.

Land, &c., purchased with partnership money in the name of one partner only.

partners or not makes no difference (*o*). In the latter case the legal owners will, even where land is purchased, and there is nothing in writing, be held to be trustees for the firm (*p*).

If a partner in breach of good faith converts the partnership assets to his own private use, it would seem on the principles applicable to similar conduct by trustees (as to which see *ante*, p. 110), that the firm would be entitled to follow the assets in the form into which they have been wrongfully converted. However, in a case of *Walton* v. *Butler* (*q*), in which a ship had been purchased by one of the partners and registered in his name, but paid for out of the partnership assets, and the firm having become bankrupt, the assignee claimed the proceeds of the sale of the ship on behalf of the joint creditors, Lord Romilly said:—"The fact of the partnership money having been laid out by one partner in the purchase for himself of a chattel, does not give the firm any right to or lien upon it. I at first supposed that this was a partnership chattel, though registered in the name of one partner only, in which case I should have been strongly inclined to think that the claimant would have been entitled to follow it. It is not necessary to express any opinion on that point, as the facts do not raise it. I am of opinion, that if one partner buy a house, a horse, a carriage, or other chattel, for himself, and pays for it by a partnership bill, this does not make it partnership property, or give the firm a lien on it."

Partnership assets tortiously converted.

If the law is correctly laid down in the above judgment, it is an exception to the general rule regulating the dealings of persons standing in a fiduciary relation to others, founded, it is presumed, on grounds of commercial convenience. The observations of Lord Romilly seem to some

(*o*) Smith v. Smith, 5 Ves. 193; *Ex parte* Hinds, 3 De G. & S. 613.

(*p*) Forster v. Hale, 5 Ves. 308, and 3 Ves. 696.

(*q*) 29 Beav. 428.

extent confirmed by the doctrine acted upon in *Nerot* v. *Burnand* (*r*).

Stock in trade, office furniture, &c., purchased by an individual partner with his own money.

Although the produce of partnership money is presumably partnership property, yet stock in trade employed by the firm cannot be presumed to be the property of one partner alone merely because he paid for it out of his own money; the presumption rather is, that it was his contribution to the common stock (*s*). But where the property is not of the nature of stock in trade, and a temporary user of it is all that the firm would require, it will not be presumed that the property has been made over to the firm out and out; *e.g.*, the partnership place of business (*t*), office furniture (*u*), &c., sometimes belong to one of the partners exclusively, subject to a right of user by the firm, so long as it subsists.

Partnership business continued by one partner with the old stock, &c.

Where a partnership is dissolved, and after the dissolution one of the partners, without the consent of the other, continues in possession of the partnership effects, and carries on the same business on the same premises, in the course of which the specific effects that belonged to the partnership are in whole or in part consumed and replaced by others, the substituted effects are not to be treated as partnership property (*v*).

Partnership in profits, but not in the source of profits.

There may be a partnership in the profits of a business or transaction not extending to the source of such profits; *e. g.*, where several persons agree to horse a coach in common and share the profits, each employing his own horses, or where a broker buys and sells goods, and is remunerated by a share in the profits, the goods being the property of the principal alone (*w*). And

Co-owners of land, &c., sharing the

persons who, after they have become co-owners of land or other property, agree to farm or work

(*r*) 4 Russ. 247, 2 Bli. N. S. 215, cited below, note (*v*).
(*s*) *Ex parte* Hare, 1 Deac. 25.
(*t*) Rowley v. Adams, 7 Beav. 548.
(*u*) *Ex parte* Murton, 1 Mont. Deac. & De G. 252; *Ex parte* Owen, 4 De G. & Sm. 351.
(*v*) Nerot v. Burnand, 4 Russ. 247; Aff. in Dom. Proc. 2 Bli. N. S. 215.
(*w*) Smith v. Watson, 2 Barn. & Cres. 401.

profits and losses do not make the land, &c., partnership capital, unless the land, &c., were merely accessory to some business.

it in common, and to share the profits and losses of the business, do not thereby convert the land or other property into partnership capital. But it is otherwise where the business is the principal thing given or acquired, and the land is merely accessory, as where a testator devised to his two sons his trading business, and the lands used by him for the purpose of carrying it on (*x*).

Conversion of joint estate into separate, and *vice versâ*.

A parol agreement is sufficient to convert joint property into separate property, and *vice versâ* (*y*). Where one of the members of a firm carries on a distinct business, goods sold by the firm to him become his separate property, and, conversely, goods sold by him to the firm become joint property (*z*).

Partner obtaining private benefit at the expense of the firm.

If one member of a firm obtains a private advantage at the expense of the firm, or to its detriment, he will be treated as a debtor to the firm in respect of the advantage so obtained. In *Bentley* v. *Craven* (*a*), four partners established a partnership for refining sugar, one of whom was a wholesale grocer, and from his business was peculiarly cognisant with the variations in the sugar market, and had great skill in buying and selling sugar at a right and proper time for the business. Accordingly, the business of selecting and purchasing the sugar for the sugar refinery was intrusted to him. Having, according to his skill and knowledge, bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sold his own sugars to the firm without letting the partners know that it was his sugar that was sold, and he was therefore held a debtor to the firm in the amount of the profit thus made. So also a master and part owner of a ship who traded with it on his own account was held bound to account for the profits which he thus made (*b*). And in like

(*x*) Jackson v. Jackson, 9 Ves. 591; 7 Ves. 535.
(*y*) *Ex parte* Williams, 11 Ves. 3.
(*z*) Bolton v. Puller, 1 Bos. & P. 539.
(*a*) 18 Beav. 75. See *supra*, p. 111.
(*b*) Gardner v. McCutcheon, 4 Beav. 534.

manner where a partner behind the backs of his co-partners obtains a renewed lease of the partnership premises, such renewed lease will be held partnership assets (*c*).

As to what profits an attorney or solicitor must account for as partnership assets, see *Collins* v. *Jackson* (*d*).

Principle of taking account as between the partners.

Accounts as between the firm and its members.] In order to complete the account of the partnership assets, the firm must be credited as against each partner with whatever that partner has failed to bring in when he ought, or has taken out as a loan, or beyond what he was entitled to, and debited with whatever the partner has advanced to or is entitled to charge the firm (*e*).

Where money or money's worth has actually passed there is no special difficulty, and the cases in which a partner is liable to be charged with profits made by him in breach of good faith have just been adverted to (*ante*, p. 322). It only remains to specify the sums with which a partner is entitled to charge the firm or to be allowed in his accounts with it.

Just allowances.

Contribution to losses.] Each partner is bound to contribute according to the agreement, and in default of any agreement, in proportion to his share of the profits, to discharge any liability of the firm (*f*), although one member may either voluntarily or under legal compulsion have paid the money in the first instance (*g*). It seems that the rule that there is no contribution between wrong doers is inapplicable, unless the partnership itself be for an illegal object (*h*).

If one partner be insolvent, the solvent partners share the loss.

If one partner is insolvent, the solvent partners must share the entire loss, though at law the rule is otherwise (*k*). Nor does a partner, if

(*c*) Featherstonhaugh v. Fenwick, 17 Ves. 311.
(*d*) 31 Beav. 645.
(*e*) West v. Skip, 1 Ves. Sen. 642.
(*f*) Collins v. Jackson, 31 Beav. 645.
(*g*) See Lefroy v. Gore, 1 Jo. & Lat. 571.
(*h*) Lindley, 643.
(*k*) Dering v. Winchelsea, 1 Cox, 318.

he has acted within the scope of his authority and to the best of his skill and judgment, lose his right to contribution by reason of the loss being attributable to his want of skill or error of judgment (*l*). But it is otherwise if his act was beyond his authority, and was not adopted by the firm (*m*.)

Allowances for trouble, &c.] In the absence of agreement a partner is in no case entitled to an allowance for his time and trouble, or for his superior skill, or, in fact, for anything except the money which he pays out of his own pocket (*n*). But he may be entitled to one for services rendered after the dissolution of the partnership in carrying on the business or otherwise (*o*), but not if he is executor of his deceased partner (*p*).

Allowance for carrying on business pending winding up.

A partner cannot claim to be allowed for moneys expended for the firm, unless he gives the particulars of the expenses (*q*). Nor can he charge the firm with unauthorized outlays, unless they are subsequently ratified or adopted, even although they may, in fact, have benefited the firm (*r*).

Particulars of moneys expended must be given.

Unauthorized outlays.

Interest.] In the absence of express or implied agreement, a partner cannot charge the firm with interest on his capital (*s*), or on money expended by him for the benefit of the business (*t*). Nor is he liable to pay interest on balances outstanding in his hands (*u*), except he has been guilty of fraud in retaining the money (*v*).

Partner not entitled to or liable to pay interest, except in cases of fraud.

(*l*) See *Ex parte* Letts and Steer, 26 L. J. N. S. Ch. 455.

(*m*) Bury v. Allen, 1 Coll. 405; Cragg v. Fords, 2 Y. & C. C. C. 280.

(*n*) Bentley v. Craven, 18 Beav. 75; Miller v. Mackray, 31 Beav. 77; Webster v. Bray, 7 Ha. 179.

(*o*) Mellersh v. Keen, 27 Beav. 242; Airey v. Borham, 29 Beav. 620; Brown v. De Tastet, Jac. 284.

(*p*) Burden v. Burden, 1 Ves. & B. 172; Stocken v. Dawson, 6 Beav. 371.

(*q*) The East India Company v. Blake, Finch, 117.

(*r*) Thornton v. Procter, 1 Anstr. 94.

(*s*) See Millar v. Craig, 6 Beav. 433.

(*t*) Stevens v. Cook, 5 Jur. N. S. 1415, but see Lindley, 650.

(*u*) Cook v. Benbow, 6 N. R. 135; Meymott v. Meymott, 31 Beav. 445.

(*v*) Fawcett v. Whitehouse, 1 Russ. & My. 135.

Return of premiums.] A partner who has paid a premium as a consideration for a partnership to endure for a certain number of years will, in the case of a premature dissolution, be entitled to a return of a part of the premium, unless his own misconduct is the sole ground of the dissolution. In general, the part returned is a sum bearing the same proportion to the entire amount as the number of years broken off from the term originally agreed upon bears to the whole term. Thus, in *Pease* v. *Hewitt*, 31 Beav. 22, the partnership was entered into for ten years, and was dissolved at the end of eight; the premium was £1000, and £200 was ordered to be returned (*w*). But this rule is not inflexible, and under special circumstances a less return will be ordered (*x*), *e. g.* in a case where the partner, during the first part of the term in fact learns the business, and his salaried assistance had been reckoned on in the latter part.

Part of premium returned upon premature dissolution, except in case of the party's own misconduct. Proportion returned.

Other points connected with accounts.] Partnership articles frequently contain provisions as to the footing upon which the accounts are to be taken, and make the last settled account binding on the executors of a deceased partner. If, in such a case, the articles are not strictly followed, a usage inconsistent with them is evidence of a new agreement, and becomes as binding as if it were prescribed by the articles. See *Coventry* v. *Barclay* (*y*), where the executors were held bound by an estimate of the value of the plant, &c., made according to the usual practice of the firm, and not entitled to have a valuation made by experts. The account will be continued beyond the dissolution, so far as may be necessary to bring into account contracts or transactions which at that time are undetermined (*z*).

Variation of partnership articles by inconsistent usage of the firm.

Profits after dissolution.

Where a surviving or continuing partner re-

Surviving partner re-

(*w*) See also Astle v. Wright, 23 Beav. 77.
(*x*) Bullock v. Crockett, 3 Giff. 507.
(*y*) 3 N. R. 224.
(*z*) See Crawshay v. Collins, 2 Russ. 345; Hale v. Hale, 4 Beav. 375.

taining assets of deceased partner.

tains the share of his deceased or retiring partner, and employs it in the business, he will be chargeable with the profits attributable to the capital so retained (*a*). Where, however, the profits are largely dependant upon the skill and industry of the partner who carries it on, there is great difficulty in ascertaining this proportion, and each case must be decided on its own peculiar circumstances (*b*).

Production of books, &c.

It is no excuse for the non-production of books, that they relate to the private affairs of the party as well as to the business of the firm, nor, as it seems, that they relate to the business of a new firm (*c*), though the party would probably be allowed to seal up on oath entries not bearing upon the account being taken.

If a partner, having books, &c., in his possession or power, will not produce them, everything will be presumed against him (*d*).

Sale the proper relief on dissolution.

Mode of realizing the assets.] Where there is no agreement, or none which it is possible for the Court to carry out as to the mode of realizing the partnership assets, each partner may, in general, insist on a sale (*e*). A direction to this effect is contained in the form of order given in the Schedule No. 25. The Court will, on slight evidence, direct an inquiry as to the best mode of sale, *e. g.* whether it is desirable to sell the business as a going concern, or whether the sale should be deferred, and the business carried on in the

Inquiry as to mode of selling.

(*a*) Crawshay v. Collins, 15 Ves. 218, 1 Jac. & W. 267; Brown v. De Tastet, Jac. 284; Cook v. Collingridge, Jac. 607.

(*b*) Willett v. Blandford, 1 Ha. 253; Smith v. Everett, 27 Beav. 446; Lindley, 833.

(*c*) Freeman v. Fairlie, 3 Mer. 43; Toulmin v. Copeland, 3 Y. & C. Ex. 655.

(*d*) See Walmsley v. Walmsley, 3 Jo. & Lat. 556, where net profits were estimated by the Master at 10 per cent., and it was intimated, that had they been estimated even at 20 per cent the report would have been confirmed. But the defendant may be compelled, under pain of contempt, to answer the question put to him in the registrar's office. See Order VI. r. 2, and *ante*, p. 36.

(*e*) Cook v. Collingridge, Jac. 607; Wilson v. Greenwood, Swanst. 471; Lindley, 857.

neantime (*f*). In this latter case, leave is enerally given to any one of the partners to ropose himself as manager till the sale. The artners, being parties to the suit, cannot bid at ne sale in the suit without leave, which may be nserted in the decree, though it is not of course, r it may be obtained on a subsequent applica- on. See *ante*, p. 37.

Partners may not bid without leave.

The goodwill, the name and style of the firm, nd the exclusive right to use the partnership rade mark, where such trade mark has ceased to ass current in the market as denoting the manu- acture of particular individuals, and has become mere brand of quality, *e.g.* the brand on Moet's hampagne, must be sold as part of the assets (*g*).

Goodwill, style, trade mark.

The debts due to the firm will not in general be old apart from the business, and where the artners are not restricted from setting up a imilar business in their own names in the imme- iate neighbourhood, this fact should be stated n the advertisements of sale (*h*). For it is o be observed that, upon the dissolution of a artnership, each partner is at liberty to use the artnership style (*k*), provided, of course, he do ot represent a former partner, who is living, as is partner still, since he would thus render such ormer partner liable to third parties.

Debts not sold apart from goodwill.

Advertisements.

Provisions as to the mode of realizing the assets pon a dissolution are frequently inserted in the rticles, and the Court will endeavour to give ffect to them, even where the course of dealing rescribed by the articles has not been strictly dhered to, and some mere formal acts have been holly omitted. Thus, in *Coventry* v. *Barclay* (*l*), artnership articles directed that the several artners should once in every year make, cast up,

Provisions in articles as to valuation, &c., upon death or retirement.

(*f*) Crawshay v. Maule, 1 Swanst. 529; Waters v. Taylor, Ves. & B. 206.

(*g*) Hall v. Barrows, 3 N. R. 259; Banks v. Gibson, 6 N. R. 73.

(*h*) Johnson v. Helleley, 5 N. R. 4, 211; where the form of dvertisement was settled by the Lords Justices.

(*k*) Banks v. Gibson, (*loc. cit.*)

(*l*) 3 N. R. 224.

and fully finish between them a true, perfect, and particular rest or reckoning in writing of their joint stock, and of the value thereof, and of their gains and losses; and that such rest should be *signed by all the partners*, and when finished *and signed*, should be conclusive except as to clerical errors exceeding £1000. In taking these rests, it had been the practice of the partners for many years not to make a regular valuation of the fixed capital, but, starting from the values given in the next preceding rest, to estimate how far these should be increased or diminished, regard being had to the outlays and deteriorations only. In July, 1860, a rest was taken in the accustomed mode, H. B., one of the partners, being absent. An abstract was sent to H. B., who expressed no disapproval of the course pursued, and died about two months afterwards, *without having signed the rest.* The surviving partners being under the articles entitled to purchase H. B.'s share, according to its value, as determined by the rest next preceding his death, it was declared that the estate of the testator H. B. was bound by the account, rest and valuation for the year ending the 5th of July, 1860, as fully as if he had duly signed the rest or valuation book for that year.

Where different mode of realization adopted.

When all the parties to the suit are *sui juris*, they can, of course, agree among themselves as to any mode of realizing the assets which they think desirable. And even where the parties are not all agreed, the Court is not absolutely precluded from directing a different mode of realization than a sale. "It is quite clear," said Lord Truro, in *Leaf* v. *Coles* (*m*), "that all the parties might, by arrangement among themselves, have altered any article in their deed of partnership, and that this Court might also have modified the terms of the partnership deed where the justice of the case required it, for generally speaking the administration of partnership affairs is within the special province of Courts of equity."

(*m*) 1 De G. M. & G. 175.

Where an arrangement is assented to by all e parties who are *sui juris*, but a difficulty arises reason of some of the parties being under dis- ility, recourse must be had to the person or urt entrusted with the management of their airs. If the party be an infant, the Court fore which the suit is heard has authority to sent to any arrangement, which it deems for s benefit (*n*), unless, by virtue of a previous suit proceeding in which the infant was concerned, e High Court of Chancery, or perhaps some other unty Court, has acquired jurisdiction over him, which case the guardian *ad litem* must apply the latter tribunal (*o*). If the party is a lunatic, t so found by inquisition, the Court, which ars the suit, can approve of any arrangement his behalf (*oo*). If the lunatic has been so found inquisition, the committee of his estate can sent to an arrangement on his behalf, although, the case be one of doubt or difficulty, he may em it necessary to seek the advice of the Lord hancellor or Lords Justices sitting in lunacy (*p*).

Where some of the parties are infants,

or lunatic.

Final decree.] The form of final decree in an dinary case is given in the Schedule No. 27.

After paying or providing for the partnership bts and outstanding liabilities, the residue is visible among the partners according to the ntract. If there is no express agreement on is point, the usage of the partners is evidence hence one may be inferred; and in default of idence the presumption is in favour of an equal stribution (*q*).

Shares of the partners.

An inquiry as to shares of the partners may be rected by the original decree, and if the ques- on depends on doubtful facts, and not merely the construction of written documents, an sue will be directed.

Inquiry or issue may be directed.

Costs.] Where the suit is for dissolution, and

(*n*) See Crawshay v. Maule, 1 Swanst. 530.
(*o*) See *ante*, p. 295. (*oo*) *Re* Macfarlane, 2 J. & H. 673.
(*p*) See Leaf v. Coles, 1 De G. M. & G. 171.
(*q*) Peacock v. Peacock, 16 Ves. 49; Collins v. Jackson, 31 av. 645; Warner v. Smith, 1 De G. J. & S. 337.

Dissolution decreed against defendant.

such dissolution is eventually decreed against the defendant on the ground of his improper conduct, it would seem that the successful plaintiff, if before the suit he applied to the defendant to consent to a dissolution, ought to receive costs up to the hearing, so far at all events as they have been increased by reason of the defendant's resisting the dissolution. If the suit is simply for winding up, or if a dissolution is decreed in a case where both plaintiff and defendant seem to have been equally in the wrong, or where neither party is in the wrong, the rule that no costs should be given on either side seems perfectly consistent with justice. In *Hawkins* v. *Parsons* (*r*) a dissolution of a partnership between the plaintiff and the two defendants was sought on the ground that the defendant Parsons was, from the state of his health, unable duly to attend to the business; and the bill also alleged that Parsons had, by engaging in another business, committed a breach of a covenant in the articles binding him diligently to apply himself to the care and management of the business and the advancement thereof, for which he was to receive a salary of £200 a year in addition to his share of the profits. The right to a dissolution was not contested, but the other defendant sought to throw the whole costs of the suit on the defendant Parsons. Lord Romilly was of opinion, that if he made Parsons pay the whole costs of the suit, he would be inflicting a great evil upon parties in all future partnership suits, as the effect would be that in all such cases charges of misconduct would be made by one partner against another, adding greatly to the expense of such suits, and occasioning great loss of time. "No doubt," he said, "in gross cases, such as the misapplication of the partnership assets and the like, which the Court dealt with on a different footing, the ordinary rule might be varied, but, except in special cases, the Court was not in the habit of dealing

Suit for winding up only.

(*r*) 10 Jur. N. S. 452.

with the costs of suits for the dissolution of partnership up to the hearing." His Lordship then proceeded to observe, that in the case before him there was the less occasion for such a direction, since it would be open to the parties to contend on taking the accounts that the defendant Parsons ought not to be allowed the salary of £200 a year. It is submitted that the above observations of the Master of the Rolls were directed to the particular case upon which he was adjudicating, and were not intended as the enunciation of any general rule; that the instance given of misapplication of assets was a mere illustration, and that the special cases mentioned immediately afterwards need not necessarily be *ejusdem generis* with the supposed case of misapplication of assets.

Dissolution on ground of lunacy.

Where a dissolution is granted on the ground of the lunacy of one of the partners, all the costs come out of the assets (*s*).

(*s*) Jones v. Welch, 1 K. & J. 765.

CHAPTER X.

ORDERS IN THE NATURE OF INJUNCTIONS.

Jurisdiction 332
Injunction Order ultra vires . 334
Costs where Injunction Order ultra vires *discharged* . . 334
Staying Proceedings . . 334
Staying Proceedings—continued.
Election between Law and Equity 334
Security for Costs . . 335
Stop Order . . . 335

Jurisdiction.] The 8th clause of the 1st section of the 28 & 29 Vict. c. 99 gives the County Courts authority to issue "orders in the nature of injunctions where the same are requisite for granting relief in any matter in which jurisdiction is given by this Act to the County Court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the Court to which the application for the order to stay proceedings is made." It will be seen that this power is merely ancillary to the jurisdiction conferred by the seven preceding clauses, and it has accordingly been considered in each of the preceding Chapters of this work.

Trustee selling improperly.

If a trustee for sale is selling improperly (*a*), an order in the nature of an injunction to restrain them from so doing will be granted in a suit to execute the trusts (*b*).

Injunctions against mortgagors or mortgagees.

If a mortgagee is improperly exercising his power of sale, he will be restrained in a suit for redemption (*c*); and a purchaser from him, with notice of the impropriety, may be made a defendant to the suit (*d*). A mortgagor in possession may, in a suit for foreclosure, be restrained from cutting timber or underwood out of the course of husbandry, if the security is a scanty

(*a*) *Supra*, pp. 193, 217.
(*b*) Anon., 6 Madd. 10.
(*c*) Matthie v. Edwards, 2 Coll. 465.
(*d*) Jenkins v. Jones, 2 Giff. 99.

one without the timber or underwood (*e*). A mortgagee in possession may also in a suit for redemption be restrained, if the security is sufficient (*ee*), from cutting timber (*f*), or committing other waste or destruction (*g*).

Injunction after notice.

By Order XI., rr. 4 and 5, where an injunction is not applied for *ex parte*, notice must be served seven clear days (*h*) before the motion is made. But under Order XXIII., r. 18, the judge may allow shorter notice to be given.

Ex parte injunctions and interim orders.

The mode of obtaining *ex parte* injunctions is pointed out in Order XII. (*i*). It is presumed that in almost every case the modern practice of the Court of Chancery will be adopted of granting an *interim* order till the day after that on which a regular motion can be made. Service of the order may be effected by the solicitor of the party, by leave of the registrar (*k*).

Effect of injunction order in other Courts.

By 15 & 16 Vict. c. 76, s. 226, it is enacted 'that in case any action, suit, or proceeding in any Court of law or equity shall be commenced, sued, or prosecuted in disobedience of and contrary to any writ of injunction, rule, or order of either of the Superior Courts of Law or Equity at Westminster, or of any judge thereof, in any other Court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other Court or judge thereof of such writ of injunction, rule, or order, the said other Court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: Provided always that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commen-

(*e*) King v. Smith, 2 Hare, 239.
(*ee*) Millett v. Davey, 31 Beav. 470.
(*f*) Farrant v. Lovel, 3 Atk. 723.
(*g*) Witherington v. Banks, Sel. Ca. in Ch. 30.
(*h*) See Ord. XXIV. (6). (*i*) See *ante*, p. 30.
(*k*) Order XXIII., r. 13.

cing, suing, or prosecuting any such action, suit, or proceeding contrary to any injunction, rule, or order of either of the Courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the Courts aforesaid in regard to the commencing, suing, or prosecuting such action, suit, or proceeding."

It would seem that, a judge of a County Court having the powers of a judge of the High Court of Chancery, an order by the County Court judge would be within this section.

Injunction order ultra vires.] If the County Court purports to make an order *ex parte* in a case where it has no jurisdiction at all, *e.g.*, an order restraining the infringement of a patent, it is conceived that the order will be a mere nullity and may be disobeyed with impunity.

Costs where injunction ultra vires discharged.] If the Court should discharge an order in the nature of an injunction, on the ground of want of jurisdiction, it is doubtful whether it could award costs to the party moving to discharge it (*k*).

To obviate such a question, the judge granting the *ex parte* order might make the undertaking as to damages (*l*) include an undertaking to pay the costs of the party against whom the order is obtained, if the Court shall so direct.

Staying proceedings.] In certain cases, orders are made by the Court of Chancery to stay proceedings.

Order for election between law and equity stays proceedings.

Election between law and equity.] According to the practice of the Court of Chancery, if the plaintiff in equity is suing at law to be relieved for the same matter, the defendant in equity is entitled to compel the plaintiff to make his elec

(*k*) It cannot give costs on the Common Law side of the Court Lawford v. Partridge, 1 H. & N. 621. Nor does the Court of Chancery exercising statutory jurisdiction, *Re* Bedford Charity 2 Sw. 470, 532; *Re* Isaac, 4 M. & Cr. 11; but see *Re* King, 1 Sim. 605; and in Bankruptcy *Ex parte* Bright, 2 Gly. & Jam. 79 See as to the Trustees Relief Act, *Re* Woodburn's Trusts, 1 D. G & J. 333, *supra*, p. 276.

(*l*) *Supra*, p. 30.

ion where he will proceed, and in the meantime o restrain the plaintiff from proceeding at law. Such an order must be within the jurisdiction of he County Court, and may be made upon motion fter notice and supported by affidavit, which vould generally be the affidavit of the defend- nt's solicitor. The order would probably be in he following form:—

Order to elect between law and equity.

"It is ordered that the plaintiffs do within eight] days elect whether they will proceed at aw or in equity against the defendants; and it s ordered, that if the plaintiffs elect to proceed at aw, or in default of their making such election y the time aforesaid, the plaint in this cause be lismissed with costs, to be taxed, &c., and in the neantime and until such election shall have been nade the plaintiffs are hereby restrained from ll further proceedings in the action at law com- nenced by them, and from commencing any ther action at law against the said defendants in espect of the matters mentioned in the pleadings n this cause" (*m*).

Mortgagee cannot be required to elect.

A mortgagee is entitled to pursue all his re- nedies at once, and cannot be compelled to lect (*n*); but a vendor cannot both sue at law n a bond for the purchase money, and also nforce his lien by suit in equity (*o*).

Order to give security for costs stays proceedings.

Security for costs.] An order to give security or costs (*p*) always includes an order that in the neantime the plaintiff is not to take any further roceeding in the cause.

Stop order.] A person entitled to a fund, or a hare of a fund, in Court may assign or charge t, or it may become subject to a charge or lien y operation of law. In such cases the assignee r incumbrancer may obtain an order analogous

(*m*) See Hogue v. Curtis, 1 Jac. & W. 449, Reg. lib. A. 1819, . 1323, Seton, 949; Royle v. Wynne, Cr. & Ph. 252.

(*n*) Booth v. Booth, 2 Atk. 243.

(*o*) Barker v. Smark, 3 Beav. 64.

(*p*) See *supra*, p. 20, and Order XXIII., r. 19, *infra* (note). t law, a foreigner's mere residence in this country is sufficient o prevent his having to give security, Tambesco v. Pacifico, 7 Exch. Rep. 816. This is contrary to Ainslie v. Sims, 17 Beav. 7. At law, if the plaintiff has real estate in this country, out of

to a *distringas* on stock, preventing the fund or share being dealt with without notice to him.

Mode of application

The application should be made by petition in the suit or matter in question.

Evidence to ground stop order.

The petitioner must prove, either by evidence or proceedings in the cause, the title of the assignor generally, *e. g.* must prove that he sustains the character of one of the next of kin of a given person, &c., but he need not show the exact share to which the assignor is entitled. The assignment must also be proved or admitted (*q*).

Service of petition.

The petition, if the assignor does not concur, must be served upon him (*r*), and upon all persons interested in the particular fund or share sought to be affected.

Form of order.

The order should be prefaced by a submission of the petitioner, that he, or the fund, or share which he seeks to affect, shall, at the discretion of the Court or judge, be liable to pay any costs, charges, or expenses which, by reason of the order having been obtained, shall be occasioned to any party to the cause or matter, or any person interested in the fund or share (*s*), and will then proceed: —"Let the £ (Bank Three per Cent. Annuities), standing in the name of the treasurer and registrar in trust in this cause [*or* matter] the account of, &c., [*or* £ cash in Court to the credit, &c.] or any part thereof respectively, to which the said B. (*the assignor*) is or may become entitled, or any interest hereafter to accrue on the said annuities, be not transferred, sold, paid out, or otherwise disposed of without notice to the said A. (*the assignee*)" (*t*).

which the costs may be recovered, he is not, although abroad liable to give security for costs; Swinbourne v. Carter, 23 L. J. N. S. Q. B. 16. But that does not seem the rule in Equity; Lord Lucan v. Latouche, 1 Hog. 448.

(*q*) Wood v. Vincent, 4 Beav. 419; Quarman v. Williams 5 Beav. 133.

(*r*) Parsons v. Groome, 4 Beav. 521.

(*s*) See Cons. Orders XXVI., r. 1.

(*t*) Seton, p. 952 (3rd ed.)

APPENDIX.

PART I.

COUNTY COURT ORDERS AND FORMS IN EQUITY.

We, JOHN BURY DASENT, DOUGLAS DENON HEATH, JOHN WORLLEDGE, RUPERT ALFRED KETTLE, and WILLIAM TURNER, being County Court Judges appointed to frame rules and orders for regulating the practice of the Courts, and forms of proceedings therein, under the 32nd section of the 19 & 20 Vict. cap. 108, have, under the powers vested in us by the Act 28 & 29 Vict. cap. 99, framed the following Rules, Orders, and Forms, and we do hereby certify the same to the Lord Chancellor accordingly.

ORDER I.

ORDER I. *Suits.— Plaint and Summons.*

SUITS.

Plaint and Summons.

1. All suits under the 1st, 2nd, 3rd, 4th, or 7th clauses of the first section of the Act shall be commenced by filing a plaint in equity in the County Court to which jurisdiction in the matter is given by the 10th section of the Act. RULE 1. Commencement of suit.

2. Every plaint in equity shall state the name, address, and description of the plaintiff, and of the person intended RULE 2. Names C. C. Rules, 1857, No. 34.

ORDER I. *Suits.*— *Plaint and Summons.*

to be brought before the Court as defendant. And where any party sues or is sued in a representative character, he shall be so described in the plaint; but this rule shall be subject to the 34th rule of the County Court Rules, 1857.

The 34th of the County Court Rules, 1857, is as follows:—

"Where the plaintiff is unacquainted with the defendant's Christian name, the defendant may be described by his surname, or by his surname and the initial of his Christian name, or by such name as he is generally known by, and the defendant may be so described in the summons; and in the event of the plaintiff or defendant not appearing, the proceedings under sects. 79 and 80 of 9 & 10 Vict. c. 95 may be taken as if the true Christian name and surname had been stated in the summons; and all subsequent proceedings thereon may be taken in conformity with such description, but without prejudice to any amendment made at any future time by direction of the judge."

See also Order XXIII., r. 7, *infra*, and as to amendment, Order XIII.

RULE 3. Plaint.

3. Every plaint in equity shall contain a concise statement of the grounds upon which the plaintiff seeks to obtain relief, and shall ask for the specific relief to which he conceives himself entitled, and also for general relief.

RULE 4. Plaint filed by attorney.

4. Where the plaint is filed by an attorney, he shall endorse thereon his name or firm and place of business, and that the plaintiff sues by him as attorney; and where there is more than one plaintiff, and the plaint is not filed by an attorney, the plaintiff who actually files the same shall endorse thereon his name and address.

RULE 5. Form of plaint.

5. Plaints in equity may be in forms similar to those set out in the Schedule to these Orders, with such variations as the nature and circumstances of each particular case may require.

RULE 6. Delivery to Registrar and filing of plaints.

6. The plaintiff or his attorney shall deliver at the office of the registrar the plaint, with as many copies thereof as there are persons to be brought before the Court as defendants, and the registrar shall forthwith endorse on the plaint a memorandum of the day on which the same was received by him, and when such plaint shall be so endorsed it shall be taken for all purposes to have been duly filed on the date so endorsed thereon.

RULE 7. Summons on plaint.

7. The registrar shall, on the filing of such plaint, make out a summons to the defendant, or to every defendant where there is more than one, to appear, and submit to the judgment of the Court thereon.

RULE 8. Date and return of summons.

8. The summons shall be in the form in the Schedule, and be dated of the day on which the plaint was filed, and may be returnable at any Court to be holden not less than one calendar month, nor more than three calendar months, from the filing thereof.

See Sch., No. 13, but this form hardly seems applicable if the Attorney General is the defendant.

9. The summons, with a copy of the plaint annexed hereto, shall be issued by the registrar to the bailiff forthwith, who shall serve the same within seven days, and the service thereof shall be proved, in conformity with the present practice of the County Courts; provided always, that the Court may, upon facts duly verified by affidavit, allow substituted service where justice requires it.

ORDER I. *Suits.—Plaint and Summons.*

RULE 9. Service of summons.

For forms of affidavit and order see Sch., Nos. 2, 3; and see Ord. XXIII., r. 14.

10. Where a defendant shall be out of England, the Judge, or in his absence the registrar, may, upon an affidavit of the fact, direct the service of the plaint and summons to be effected within such time and in such manner as the Judge or registrar may think fit.

RULE 10. Service when defendant is out of jurisdiction of County Courts.

ORDER II.

SUITS.

Proceedings after Service.

ORDER II *Suits. Proceedings after service.*

1. Where any defendant desires to admit the truth of the allegations in the plaint, and to submit to the judgment of the Court, he may, at any time before the return day of the original summons, in the presence of a registrar of a County Court, or in the presence of one of his clerks, or of an attorney of one of the Superior Courts, sign an admission in the form contained in the Schedule to these Orders; and the signature of the defendant thereto shall be verified by affidavit, unless signed in the presence of the registrar of the Court in which the suit is, or of one of his clerks.

RULE 1. Admission.

For forms of admission and affidavit see Sch., Nos. 17, 18.

2. The admission shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or, where the plaint is filed by an attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff, or the attorney, as the case may be, and after the receipt of such copy the plaintiff shall be entitled to the costs then already incurred, and to the further costs of attending the Court and obtaining the decree or order to be made upon such admission, but to no other costs.

RULE 2. Notice of admission.

This seems to apply only to costs before decree, not to the costs of the subsequent proceedings in the registrar's office, see *supra*, p. 82.

3. The defendant may, within eight days after the service of the summons, by a statement in writing signed by him,

RULE 3. Statement in the nature

ORDER II. *Suits.— Proceedings after service.*

of a disclaimer or answer may be filed by defendant.

disclaim any interest in the subject matter of the suit, or admit or deny any of the statements in the plaint, or raise any question of law on such statements without admitting the truth thereof; or he may state concisely any new fact or document upon which he intends to rely as a defence at the hearing, or which he thinks advisable to bring to the notice of the Court. Provided always, that in exercising his discretion as to costs, the judge shall consider the fact of a defendant having or not having availed himself of the powers given by this rule.

See form in Sch. No. 19.

RULE 4. Statement to be filed.

4. The statement under the last foregoing rule shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or where the plaint is filed by attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff or the attorney, as the case may be.

RULE 5. Statement filed by attorney.

5. Where the statement is filed by an attorney he shall endorse thereon his name or firm and place of business, and that the defendant defends by him; and where it is not filed by an attorney, the defendant who actually files the same shall endorse thereon his name and address.

RULE 6. Dismissal of suit.

6. The plaintiff may at any time before setting down the cause for hearing, by notice in writing delivered at the office of the registrar, require the plaint to be dismissed as against all or any of the defendants, with costs, without prejudice to further proceedings or suits, and such notice shall operate as an order to dismiss accordingly; and the registrar shall forthwith file such notice, and forward a copy thereof by post or otherwise to each of the defendants.

ORDER III. *Suits.— Evidence.*

ORDER III.

SUITS.

Evidence.

RULE 1. Evidence to be taken viva voce.

1. Except where otherwise provided by these Orders, the evidence of witnesses shall be taken vivâ voce on oath according to the present practice on the hearing of plaints.

RULE 2. As to admission of documents. 21 & 22 Vict. c. 27, s. 7(*a*).

2. Where a party desires to give in evidence any document, he may, not less than five days before the hearing, give notice to any other party in the cause who is competent to make admissions, requiring him to inspect and admit such document; and if such other party shall not within a reasonable time make such admission, any expense of proving

(*a*) See this section *infra*, Part II.

the same at the hearing shall be paid by him, whatever be the result of the cause, unless the Court shall otherwise order; and no costs of proving any document shall be allowed unless such notice be given, except in cases where, in the opinion of the registrar, the omission to give such notice has been a saving of expense.

See also rule 6 and C.C. Rules, 1857, r. 76, cited below.

RULE 3. Inspection of documents in possession or control of an opposite party. See C. C. Rules 63, 76, and 15 & 16 Vict. c. 86, s. 18.

3. Where a party desires to inspect any document in the possession or under the control of any other party, he may, five days before the hearing, give notice to such other party, that he or his attorney desires to inspect the same at any place to be appointed by such other party; and if such other party shall not appoint a convenient place, or allow the party giving such notice, or his attorney, to inspect such document within three days after receiving such notice, the judge may adjourn the hearing, and make such order as to costs as he shall think fit.

The 63rd and 76th of the County Court Rules of 1857 are as follow:—

63. Where in any action the plaintiff or defendant is desirous of inspecting any written or printed document or instrument in which he has an interest, and to the production of which he is entitled for the purposes of the action, and which shall be in the possession or power or under the control of the other party, such plaintiff or defendant may, five clear days before the day of hearing, give notice to the other party by post or otherwise, that he or his attorney desires to inspect any such document or instrument, describing the same, at any place to be appointed by the other party; and if such other party shall neglect or refuse to appoint such place or to allow such plaintiff or defendant or his attorney to inspect such document or instrument within three days after receiving such notice, the judge may, in his discretion, on the day of hearing, adjourn the cause and make such order as to costs as he shall think fit.

76. Where either party proposes to give a judgment of a Superior Court or any other document, whether printed or written, in evidence, he may, by a demand in writing made a reasonable time before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the document to be read in evidence without proof; and if such demand be not made, no costs of proving such document shall be allowed unless the judge shall otherwise order. If such demand be not complied with, and the judge think it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the event of the cause.

The 18th section of the 15 & 16 Vict. c. 86 will be found *infra*, Part II.

RULE 4. Summons to witness.

4. Where a party requires the attendance of any other party, or of any witness, either to give evidence or to produce documents, he shall apply to the registrar to issue a summons requiring such other party or witness to attend

ORDER III. *Suits.— Evidence.*

the Court or the registrar, as the case may be, or to attend and produce documents; and such summonses shall respectively be drawn up by the registrar, and be issued by him to the bailiff, who shall serve the same; and in every summons to produce documents the registrar shall insert a description of the documents required.

RULE 5 Compulsory production of documents by parties to suit, 15 & 16 Vict. c. 86, ss. 18 & 20.

5. Where a party served with a summons under the last rule shall not at the hearing produce the documents required, the Court may, upon admission or proof of the service of such summons within a reasonable time, and that such documents are in the possession of the party so served, and that they relate to the matter then pending before the Court, make an order for their production by him, and the Court may deal with them, when so produced, and with all costs occasioned by their non-production, as may appear just: Provided that nothing herein shall prevent the Court from receiving secondary evidence of any document of which notice to produce has been given.

The 18th and 20th sections of 15 & 16 Vict. *c.* 86 are given *infra*, Part II.

RULE 6. Documents unobjected to received without formal proof.

6. Where any documents are produced to the Court from proper custody, they shall be read without further proof, if they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the judge may adjourn the hearing and the party objecting shall pay the costs caused by such objection, in case the same shall afterwards be proved, unless the judge shall otherwise order.

See rule 2, and the 76th of the C. C. Rules, 1857, *ante*, p. 341.

RULE 7. Affidavit.

7. Where the party desires to use at the hearing an affidavit by any particular witness, or an affidavit as to particular facts, he may, ten days before the hearing, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last mentioned party shall within five days give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof.

RULE 8. Examination de bene esse.

8. Where it shall be necessary to examine a witness *de bene esse*, application upon affidavit shall be made to the Judge to appoint an examiner for that purpose.

RULE 9. Special examination.

9. Upon the application of a party desirous to examine a witness residing out of the jurisdiction of the Court, the judge may, if he thinks fit, appoint the registrar of the Court within the district of which such witness resides to take the examination of such witness.

RULE 10. How examination conducted.

10. Where any witness is examined by a registrar he shall be examined on oath, and the registrar shall transcribe the answers of such witness, and the deposition shall be

subscribed by the witness and the registrar who shall have so examined him, and shall then be transmitted by post to the registrar of the Court in which the suit or proceeding is pending.

ORDER III. *Suits.— Evidence.*

The examination will be conducted in the mode pointed out in the 15 & 16 Vict. c. 86, ss. 31-34 (see *infra*, Part II.), the word "examination" including, it is conceived, cross-examination and re-examinaton. In the Court of Chancery these sections are now only resorted to by consent, the general mode of taking evidence being governed by the Order of Feb. 5, 1861, made under the authority of 23 & 24 Vict. c. 128.

11. The allowance to be made to witnesses for attendance either before the Court or registrar shall in no case exceed the highest rate of the allowances mentioned in the scale in the Schedule.

RULE 11. Allowance to witnesses.

ORDER IV.

SUITS.

Hearing.

ORDER IV. *Suits.— Hearing.*

1. Upon the day on which the summons is returnable all parties shall come to the Court prepared, so far as the nature of the case will admit, with evidence to enable the judge to try the whole matter of the suit upon the merits, and then to determine the same by a final decree or to make such decretal order, or give such directions for adding parties to the suit, for making inquiries, taking accounts, realizing assets, or doing any act, which (*a*) the judge may consider necessary to enable him to make a final decree upon a day to which the hearing may be adjourned.

RULE 1. How parties to come prepared.

2. A suit in equity shall be heard in open Court as plaints in the County Court are now tried.

RULE 2. Hearing.

3. Affidavits and depositions used at the hearing shall be read as the evidence of the person by whom they are used.

RULE 3. Affidavits.

4. Upon the hearing the Court may dismiss the suit, or grant the relief asked by the plaint, or any part thereof, or may grant any other relief consistent with the case made by the plaint, or make any order giving directions for, or with respect to, the prosecution of the suit, as the circumstances of the case may require, and also make such order as to costs as the Court may think fit.

RULE 4. Decree or decretal order.

5. Where the Court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the Court shall adjourn the hearing, and appoint a day for the trial of such question by a jury; and thereupon the practice shall be in all respects the same as that under the County Court Acts and Rules now in force, in cases

RULE 5. Jury. 28 & 29 Vict. c. 99, s. 7.

(*a*) *Quære*, as.

ORDER IV. *Suits.— Hearing.*

where either party has required a jury, including the power to direct a new trial when necessary.

RULE 6. Record for trial.

6. Where the Court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the Judge shall reduce the question into writing, and the same shall be called the "Record for Trial."

ORDER V. *Suits.— Decretal Orders.*

ORDER V.

SUITS.

Decretal Orders.

RULE 1. Registrar to draw order.

1. Where the Court makes any decretal order the registrar shall, as soon thereafter as conveniently may be, draw up, seal, and file such order.

RULE 2. Preparation of a deed.

2. Where a decretal order directs any deed to be prepared and executed, it shall state by what party the said deed shall be prepared, and to whom it shall be submitted for approval.

RULE 3. Receiver.

3. Where upon the hearing it appears to the Court expedient that a receiver be appointed, such appointment shall be made by the decretal order, whether the same be asked as part of the relief in the plaint or not.

RULE 4. Sale of real property.

4. Where real property is ordered to be sold, the decretal order shall direct who shall have the conduct of the sale, and by whom the conditions and contracts of sale, and the abstract of title, shall be prepared. And where any conditions or contracts are ordered to be settled by a conveyancing counsel, it shall name the counsel to whom they are to be submitted.

RULE 5. Sale of personal property.

5. Where a decretal order directs any personal property to be sold, the same shall be sold, under the superintendence of the high bailiff, by public auction, unless the Court shall otherwise order.

RULE 6. Accounts or inquiries.

6. Where any decretal order directs any accounts or inquiries to be taken or made, or any acts to be done, by the registrar, high bailiff, receiver, or parties, it shall name a day within which all such acts shall be done, and accounts and inquiries completed, and shall also name a day, not less than fourteen days after that day, on which the registrar shall certify the result of the accounts and inquiries, and what has been done under such decretal order, and on which the cause will be further heard, and if practicable a final decree made.

ORDER VI. *Execution of decretal orders.*

ORDER VI.

EXECUTION OF DECRETAL ORDERS.

RULE 1. Deed how settled.

1. Where a deed is ordered to be prepared, and the parties

annot agree upon the form thereof, the judge may, upon he application of either party, settle the same himself, or name a conveyancing counsel by whom the same shall be settled, subject to the final approval of the judge.

ORDER VI. *Execution of decretal orders.*

2. Where a decretal order directs that any account be taken or inquiry made, such account shall be taken and nquiry made by the registrar, and he shall for that pur- pose have all the powers and discharge all the duties of a chief clerk of the Master of the Rolls, or a Vice Chan- cellor in the Court of Chancery; and all parties prosecuting ny such accounts or inquiries shall have the same power f summoning witnesses, including as witnesses any parties n the cause, and of examining them on such accounts or nquiries, and of compelling the production of documents, s they had on the original hearing; and all rules as to he summoning, swearing, and examining of witnesses, and he production of documents at the hearing, shall be appli- able (as far as may be) to such summoning, swearing, examining, and production on taking any such accounts, or prosecuting any such inquiries.

RULE 2. In taking accounts, &c., Registrar to be chief clerk. 15 & 16 Vict. c. 80, ss. 30, 31.

For the sects. 30 and 31 of 15 & 16 Vict. c. 86, see *infra*, Part II.

3. Where a decretal order directs accounts to be taken, ny books of account in which the accounts required to be aken, or any of them, have been kept, shall, unless the udge shall otherwise direct, be taken as *primâ facie* vidence of the truth of the matters therein contained, with iberty to the parties interested to take such objections hereto as they may be advised.

RULE 3. In taking accounts, account books to be prima facie evidence of the matters therein contained.

See 15 & 16 Vict. c. 86, s. 54, *infra*, Part II.

4. Every advertisement for creditors or other persons aving any claim or interest in the distribution of any assets o be administered by the Court, which shall be issued ursuant to any decretal order, shall direct every such reditor or other person, by a time, to be thereby limited, o send to the registrar his name and address, and the full articulars of his claim or interest, and a statement of his ccount, and the nature of the security (if any) held by im, and at the time of directing such advertisement a me shall be fixed for adjudicating on the claims.

RULE 4. Advertisement for creditors, &c. (*a*)

5. No such creditor or other person need make any ffidavit, or attend in support of his claim, unless he is rved with a notice requiring him to do so, as hereinafter rovided.

RULE 5. Creditors need not attend without notice.

6. Every creditor shall produce or transmit to the

RULE 6. Securities, deeds, and

(*a*) With rules 4—12 compare the recent order in Chancery of he 27th of May, 1865.

ORDER VI. *Execution of decretal orders.*

documents to be produced to registrar.

registrar any security held by him, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar all other deeds and documents necessary to substantiate his claim before the registrar at his office at such time as shall be specified in such notice.

RULE 7. Pedigree or proof to be produced to registrar.

7. Every person claiming as heir-at-law, devisee, next of kin, or legatee shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar any pedigree or proof mentioned in such notice within such time as shall be therein specified.

RULE 8. Costs when not allowed.

8. In case any creditor or other person shall neglect or refuse to comply with the two last preceding rules, he shall not be allowed any costs of proving his claim unless the registrar shall otherwise direct.

RULE 9. Proof of debts or claims.

9. At the time appointed for adjudication upon the debts or claims, the registrar shall take the evidence of the executor, administrator, or other accounting party upon such debts or claims, and may thereupon, in his discretion, allow any of such debts or claims without further proof, and may direct such investigation of all or any of the debts or claims not allowed, and require such further particulars, information, or evidence relating thereto as he may think fit, and may, if he so think fit, require any creditor or other person to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed.

RULE 10. Notice of allowance.

10. Notice of allowance shall be given by the registrar to every creditor or other person whose claim, or any part thereof, has been allowed, and notice shall also be given by him to every such creditor or other person as he shall think fit, to attend and prove his claim or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any such creditor or other person shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed.

RULE 11. Claims not before made.

11. Any such creditor or other person who has not before sent in the particulars of his claim pursuant to the advertisement, may do so two days previous to any day to which the adjudication is adjourned.

RULE 12. Claims too late.

12. If any claim be sent in after the time fixed by the advertisement (except as before provided in case of an adjournment,) the registrar may, upon special application, entertain the same, upon such terms and conditions as to costs and otherwise as he thinks fit.

RULE 13. Allowances.

13. In taking any account directed by any decretal order, all just allowances shall be made without any directions for that purpose in such order.

14. Where the registrar, high bailiff, receiver, or any party has by any decretal order been directed to do any act for doing which it may be found necessary to have further directions or an order of the Court, the registrar shall apply to the judge for such direction or order, and upon such application the judge may give such direction or make such order as he may think fit, or may appoint a time to hear all parties upon the application so made by the registrar; and if the judge shall make such appointment for hearing, the same shall operate as a stay of proceedings in the suit until the day so appointed, if he shall so direct.

ORDER VI. *Execution of decretal orders.*

RULE 14. Application to judge for further directions mero motu.

ORDER VII.

SUITS.

Absent Parties.

ORD. VII. *Suits.— Absent Parties.*

1. Where any matter is referred to the registrar by a decretal order, he shall, as soon as conveniently may be, ascertain if there are any parties who, if the decretal order had been made in a suit pending in the Court of Chancery, ought, under the 42nd section of the 15 & 16 Vict. c. 86, to be served with a notice under Rule 8 of such section.

RULE 1. Inquiry as to parties.

The section referred to is given *infra*, Part II.

2. Where it shall be necessary to serve any parties with the notice mentioned in the foregoing rule, the same shall be prepared by the registrar, and issued by him to the bailiff, who shall serve the same, and upon such notice the party served therewith may attend the proceedings under the decretal order.

RULE 2. Notice to parties.

3. Any party who shall be served with a notice under the last foregoing rule may apply to the Court at the next sitting, or, by leave of the judge, at any subsequent sitting, to vary or add to the decretal order.

RULE 3. Application to vary or add to decretal order.

ORDER VIII.

SUITS.

Registrar's Certificate.

ORD. VIII. *Suits.— Registrar's Certificate.*

1. Where a registrar has been ordered to certify to the Court upon any matter, he shall present to the Court a certificate in writing signed by him.

RULE 1. Registrar's certificate.

2. The registrar shall prepare his certificate seven days before the day appointed for presenting the same, and shall

RULE 2. Registrar's certificate to lie in office.

ORD. VIII. *Suits.— Registrar's Certificate.*

give notice to all the parties to the suit that the same lies in his office for the inspection of any parties interested therein or affected thereby; and he shall deliver a copy thereof to any person requiring the same, upon payment of the costs of such copy.

RULE 3. Variation of registrar's certificate.

3. Where any party interested in or affected by the registrar's certificate desires to have the same varied, he shall apply by himself, his counsel or attorney, at the Court on the day appointed for presenting the same, and the judge shall thereupon hear and determine such application, and shall confirm or vary the certificate, and make such further order thereupon as he may think fit.

RULE 4. Confirmation of certificate.

4. If no application shall be made to vary the certificate, it shall be taken as confirmed, unless the judge shall otherwise order.

ORDER IX. *Suits.— Final Decree.*

ORDER IX.

SUITS.

Final Decree.

Final decree.

When the Court has determined all the questions raised between the parties the registrar shall, as soon thereafter as conveniently may be, draw up a final decree in accordance with the judgment of the Court, and seal and file the same.

ORDER X. *Suits.— Revivor and Supplement.*

ORDER X.

SUITS.

Revivor and Supplement.

RULE 1. Order under 15 & 16 Vict. c. 86, s. 52.

1. Upon any suit becoming abated by death, marriage, or otherwise, or defective in consequence of any change or transmission of interest or liability, the judge shall, on application of any person having a right so to apply, make an order reviving the said suit, or such supplementary decree or order as may have become necessary in consequence of any such matters as aforesaid.

RULE 2. Order to be served.

2. An order under the foregoing rule shall be drawn up by the registrar and sealed with the seal of the Court, and issued to the bailiff, who shall serve the same upon such person or persons as the Court shall direct.

RULE 3. Person served to be bound thereby and may appeal. 15 & 16 Vict. c. 86, s. 52.

3. After service of such order the suit shall, as between the party by whom the order has been obtained and the party on whom it has been served, be in the same plight and condition as it was in before it had become abated or defective as aforesaid; provided that the person so served may move the Court at the next sitting, or, by leave of the

dge, at any subsequent sitting, to discharge such order, nd such motion shall be made upon affidavit of the facts lied upon to support the same. ORDER XI. *Proceedings under the 5th, 6th and 8th Clauses of the 1st Section.*

For sect. 52 of 15 & 16 Vict. c. 86, see *infra*, Part II.

ORDER XI.

ROCEEDINGS UNDER THE 5TH, 6TH, AND 8TH CLAUSES OF THE 1ST SECTION.

1. All proceedings under the 5th and 6th clauses of the rst section of the Act shall be by petition, and such petion need not show title except so far as is provided by the ules in this order. RULE 1. Petition.

2. Where a trustee petitions under the said 5th clause or an order in any matter relating to the trust, he shall le his petition at the office of the registrar, and leave hereat as many copies thereof as there are persons beneicially interested in the due execution of the trust, and he hall state in such petition his own name, address, and escription, and also the names, addresses, and descriptions f the persons beneficially interested, so far as he is able, nd the nature of the trust, and how created, the property r money to which the same relates, and the substance of he order which he seeks to obtain. RULE 2. Petitions by trustees.

A form of petition is given in the Schedule No. 9.

3. Where any guardian or trustee of any infant petitions or an order relating to the maintenance or advancement f such infant, he shall file his petition at the office of the egistrar, and where any person, as next friend of an infant, etitions on behalf of such infant for an order upon or gainst the guardian or trustee of such infant, he shall file is petition at the office of the registrar, and leave thereat s many copies thereof as there are guardians or trustees. nd in such petition shall be stated the names, addresses, nd descriptions of the petitioner, and of all the persons to hom such order is intended to relate, and shall also state he nature of the guardianship or trust, and how created, f the property to which the trust relates, and the subance of the order which the petitioner seeks to obtain. RULE 3. Petitions by guardian or trustee of infant or next friend.

See the form Sch. No. 10.

4. Where any person intends to apply under the 8th ause of the first section of the Act, for an order in the nture of an injunction (except as is provided in Order XII. r urgent cases) he shall deliver at the office of the regisar a notice of his intention to apply for the same, together RULE 4. Application for injunction.

ORDER XI. *Proceedings under the 5th, 6th and 8th Clauses of the 1st Section.*

with as many copies thereof as there are persons upon or against whom such order is intended to be obtained, and he shall state in such notice his own name, address, and description, and, so far as he can, the names, addresses, and descriptions of all such persons, and also the substance of the order which the petitioner seeks to obtain.

See the form Sch. No. 12.

RULE 5. Time of filing petitions and giving notices.

5. Under this order petitions shall be filed and notices shall be delivered at the office of the registrar seven days before the sitting of the Court at which the petition is to be heard or application made.

Under Order XXIII., rule 18, the time may be abridged.

RULE 6. Registrar to issue notices.

6. The registrar, upon receiving any such petition or notice and the copies thereof, shall issue the copies under the seal of the Court to the bailiff for service upon the respective persons to whom they are addressed, together with a notice, signed by himself and under the seal of the Court, informing them of the day and hour on which the petition or application will be heard, and that if they do not attend, either in person or by their attorneys, such order will be made and proceedings taken as the judge may think just and expedient.

RULE 7. Service of petitions and notices.

7. The bailiff of the Court shall, four days at least before the hearing, serve all copies of such petitions and notices.

RULE 8. Facts may be supported by affidavit.

8. Upon the hearing of any petition or application under this order, unless the judge shall otherwise direct, the facts relied upon in support of or in opposition to such petition or application shall be proved by affidavit.

RULE 9. Registrar to draw up order.

9. Where the judge makes an order upon such petition or application, the registrar shall, as soon thereafter as conveniently may be, draw up, seal, and file such order.

RULE 10. Orders as to suits to extend to proceedings.

10. The preceding orders relating to suits shall, in all cases where they are applicable, be construed as extending to proceedings under this order.

ORD. XII. *Suits and Proceedings.—Ex parte applications.*

ORDER XII.

SUITS AND PROCEEDINGS.

Ex parte Applications.

RULE 1. Peremptory motions.

1. Wherever in any suit or proceeding it shall become necessary to secure the possession of any property, or to obtain security from any person for any monies in his possession, or to enforce the deposit or the payment into Court thereof pending litigation, or the immediate sale of any

goods or chattels, and the deposit or payment into Court of the purchase money thereof, or to obtain an order in the nature of an injunction, any party may apply ex parte to the judge, either in or out of Court, upon affidavits setting forth the facts rendering such order immediately necessary, and upon such application the judge may either make an order absolute in the first instance, or make an order to be absolute at any time to be ordered by him unless cause be shewn to the contrary, or may make such other order or give such directions in the matter as the judge may think fit, and may order immediate execution.

ORD. XII. *Suits and Proceedings.—Ex parte Applications.*

This order is considered *supra*, p. 32.

2. The draft of all orders under the foregoing rule shall be prepared beforehand by the registrar of the Court in which such suit or proceeding is pending, and shall be presented by the party when he makes such application to the judge to settle and sign.

RULE 2. Orders how drawn.

3. The draft so signed shall be transmitted by the applicant to the registrar of the Court in which the suit or proceeding is pending, who shall draw up the order in conformity therewith, and seal and file the same, and issue a copy thereof under the seal of the Court to the bailiff for service, and execution shall be issued thereon, as by the order is directed.

RULE 3. Orders how drawn and executed.

Probably in an urgent case the applicant will be allowed to effect the service by his own solicitor, under Order XXIII., r. 13.

ORDER XIII.

SUITS AND PROCEEDINGS.

Amendments.

ORD. XIII. *Suits and Proceedings.—Amendments.*

The judge may, at or during the hearing, and before a final decree or order be made in any suit or proceeding under the Act, exercise all powers of amendment mentioned in the 57th section of the statute 19 & 20 Vict. c. 108, so far as the same may be applicable to suits and proceedings in equity, and also all the powers and authorities of a judge of the High Court of Chancery; and "The County Court Rules, 1857," which are numbered respectively 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100, shall apply, so far as they are applicable, to all suits and proceedings under this Act.

Amendments. 15 & 16 Vict. c. 86, ss. 49 and 53.

The 19 & 20 Vict. c. 108, s. 57, is as follows:—

The judge of a County Court may at all times amend all defects and errors in any proceeding in such Court, whether

ORD. XIII. *Suits and Proceedings,—Amendments.*

there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for.

The following are the County Court Rules of 1857 referred to in the Order:—

Wrong person made defendant.

91. Where a person other than the defendant appears at the hearing and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant if the plaintiff consents, and thereupon the cause shall proceed, as to set-off and other matters, as if such person had been originally named in the summons, and the costs of the person originally named as defendant shall be in the discretion of the judge.

Party wrongly suing or sued *in auter droit*.

92. Where a party sues or is sued in a representative character, but at the hearing it appears that he ought to have sued or been sued in his own right, the judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly; and thereupon the cause shall proceed, as to set-off and other matters, as if the proper description of the party had been given in the summons.

Party wrongly suing or sued in his own right.

93. Where a party sues or is sued in his own right, but at the hearing it appears that he ought to have sued or been sued in a representative character, the judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly; and thereupon the cause shall proceed, as to set-off and other matters, as if the proper description of the party had been given in the summons.

Misnomer of plaintiff.

94. Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may at the hearing be amended at the instance of either party by order of the judge on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made.

Misnomer of defendant.

95. Where the name or description of a defendant in the summons is insufficient or incorrect, and the defendant appears and objects to the description, it may at the hearing be amended at the instance of either party, by order of the judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made; but if no such objection is taken to the name or description the cause may proceed, and in the judgment and all subsequent proceedings founded thereon, the defendant may be named and described in the same manner.

Misjoinder or nonjoinder of wife.

96. In actions by or against a husband, if the wife be improperly joined or omitted as a party, the summons may at the hearing be amended at the instance of either party by order of the judge on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the proper person had been made a party to the suit.

Misjoinder of plaintiffs.

97. Where it appears at the hearing that a greater number of persons have been made plaintiffs than by law required, the name

f the person improperly joined may, at the instance of either arty, be struck out by order of the judge on such terms as he hall think fit, and thereupon the cause shall proceed, as to set-off nd other matters, as if the proper party or parties had alone een made plaintiffs. ORD. XIII. *Suits and Proceedings.— Amendments.*

98. Where it appears at the hearing that a less number of persons have been made plaintiffs than by law required, the name of he omitted person may, at the instance of either party, be added y order of the judge, on such terms as he shall think fit; and hereupon the cause shall proceed, as to set-off and other matters, s if the proper persons had been originally made parties; and if uch person shall, either at the hearing or at some adjournment hereof, personally or by writing signed by him or his agent, onsent to become a plaintiff in manner aforesaid, the judge shall hen pronounce judgment as if such person had originally been ade a plaintiff; but if such person shall not consent to become plaintiff in manner aforesaid, either at the hearing or at an adjournment thereof, judgment of nonsuit shall be entered. Nonjoinder of plaintiffs.

99. Where it appears that a greater number of persons have been made defendants than by law required the name of the person improperly joined may, at the instance of either party, be struck out by order of the judge on such terms as he shall think fit; and thereupon the cause shall proceed, as to set-off and other matters, as if the proper party or parties had alone been made defendants, and the costs of the person improperly joined s a defendant shall be in the discretion of the judge. Misjoinder of defendants.

100. Where two or more persons are made defendants and ome of them have not been served, the name or names of the efendant or defendants who have not been served may, at the nstance of either party, be struck out by order of the judge, on uch terms as he shall think fit, and thereupon the cause shall roceed, as to set-off and other matters, as if the party or parties hose name or names have not been struck out had alone been ade defendant or defendants. Defendants not served.

The 49th and 53rd sections of the 15 & 16 Vict. c. 86 are given *nfra*, Part II.

ORDER XIV.

ORD. XIV. *Suits and Proceedings.— Affidavits.*

SUITS AND PROCEEDINGS.

Affidavits.

1. All affidavits shall be expressed in the first person of he deponent. RULE 1. Affidavits to be expressed in the first person.

2. All affidavits shall state the deponent's age, occupation, uality, and place of residence, and also what facts or circumstances deposed to are within deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to, or believed by him y reason of information derived from other sources than is own knowledge, and what such sources are. RULE 2. Sources of knowledge to be stated.

3. The costs of affidavits not in conformity with the last wo preceding rules shall be disallowed on taxation, unless he Court shall otherwise direct. RULE 3. Costs of affidavits when disallowed.

ORD. XIV. *Suits and Proceedings.—Affidavits.*

RULE 4. Filing of affidavits.

RULE 5. Erasure, blotting, interlineation, &c., in affidavits.

4. Before any affidavit is used it shall be filed in the office of the registrar.

5. No affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, nor any affidavit in which there is any interlineation, unless the person before whom the same is sworn shall have duly authenticated such interlineation with his initials in such manner as to show that such interlineation was made before it was sworn, shall be filed or used in any suit or proceeding.

ORDER XV.

SUITS AND PROCEEDINGS.

Rehearing.

ORDER XV. *Suits and Proceedings.—Rehearing.*

Rehearing to be allowed on special grounds only.

No decree or order once made shall be reheard unless in any case in which the judge, on special grounds, shall think such rehearing necessary, and then only on such terms as the judge may think just.

ORDER XVI.

SUITS AND PROCEEDINGS.

Enforcement of Decrees and Orders.

ORD. XVI. *Suits and Proceedings.—Enforcement of Decrees and Orders.*

RULE 1. Service of decree or order.

RULE 2. When execution may issue.

RULE 3. Warrant of fi. fa.

1. On the application of the party entitled to the benefit of the decree or order, the registrar shall issue to the bailiff a copy of such decree or order under the seal of the Court with a notice to the party to be bound endorsed thereon, and the bailiff shall forthwith serve the same upon the party to whom such notice is addressed.

2. No process shall issue to enforce any decree or order, unless by leave of the judge, until three days after a copy thereof under the seal of the Court shall have been served upon the party to be bound thereby.

3. Where any decree or order is made for the payment of money into Court or by one party to another, the registrar shall, after the expiration of the time, if any, appointed by the decree or order for the payment thereof, and after the expiration of the time limited by this order, upon application by the person having the conduct of the suit, or by the payee, issue to the bailiff of the Court a writ of fieri facias as a warrant of execution, as provided by section 94 of 9 & 10 Vict. c. 95.

The 9 & 10 Vict. c. 95, s. 94, is as follows:—

And be it enacted, that whenever the judge shall have made an order for the payment of money, the amount shall be recoverable in case of default or failure of payment thereof, forthwith or a

ıe time or times, and in the manner, thereby directed, by execu- on against the goods and chattels of the party against whom ıch order shall be made; and the clerk of the said Court, at the equest of the party prosecuting such order, shall issue, under the eal of the Court, a writ of *fieri facias* as a warrant of execution o the high bailiff of the Court, who by such warrant shall be mpowered to levy or cause to be levied by distress and sale of ıe goods and chattels of such party such sum of money as shall e so ordered, wheresoever they may be found within the district f the Court, whether within liberties or without, and also the osts of the execution; and all constables and other peace officers ithin their several jurisdictions shall aid in the execution of very such warrant.

RULE 4. Warrant of possession or assistance.

4. Where by a decree or order made in any suit or proeeding for the delivery up to any person of lands or teneıents, goods or chattels, either as owner thereof, or to be old, or to be held in possession until an order is made as o the disposition thereof, the registrar shall, upon the pplication of the person entitled to such possession, issue o the bailiff either a warrant of possession, or warrant of ssistance, as the case may require.

Forms of warrants of *fieri facias*, of assistance, and of possesion are given in the schedule, Nos. 34, 35, 36. They are framed nder the 8th section of the recent Act. *Supra*, p. 3.

Power of County Court to commit for breach of injunction or order.

The ancient, and until lately the only mode of enforcing orders f the Court of Chancery was by process of *contempt* directed against he person of the party disobeying the order. The 18th section of he 1 & 2 Vict. c. 110 made decrees and orders of Courts of Equity quivalent to judgments of the Superior Courts of common law; nd the 20th section empowered the judges of the Court of Chanery to frame writs of execution accordingly. It was evidently ıot intended that the power of the County Courts in regard to rocess of *execution* should be exactly similar to that possessed by he Court of Chancery, and the recent Act therefore defines the ower of the County Courts in this respect.

A difficulty still remains as to the power of a County Court to nforce obedience to its decrees and orders by process of contempt. Before discussing this question, it will be convenient to describe he mode of proceeding in the Court of Chancery upon an order r injunction. This is as follows:—

The party is served with the order or writ in the usual way, nd if he fail to obey it an order of committal may be made upon notion of which personal notice has been given. When settled y the registrar, it is handed to the Lord Chancellor's tipstaff, vho thereupon obtains the Lord Chancellor's warrant to arrest he party and convey him to Whitecross Street Prison. The rder is delivered to the keeper of the prison, and is a sufficient uthority to him to detain the prisoner (see *Re Dimes*, 19 L. J. Q. B. 158), and the tipstaff retains the warrant as his own justiication.

The warrant is in the following form:—

'Lord Chancellor.

"Between P. W. - - - Plaintiff.

and

D. C. - - - Defendant.

ORD. XVI. *Suits and Proceedings.—Enforcement of Decrees and Orders.*

"Whereas by an Order made by his Honor Vice Chancellor "Stuart in the above cause, bearing date the 12th day of April, "instant, it was ordered that the defendant D. C. and J. B., in "the said order named, should stand committed to the Queen's (*a*) "Prison for their contempt in the said order mentioned; THESE "ARE THEREFORE, in pursuance of the said order, to will and "require you forthwith upon receipt hereof to make diligent "search after the bodies of the said D. C. and J. B. and whereso-"ever you shall find them, or either of them, to arrest and "apprehend them or either of them, and them or either of "them safely convey to the Queen's Prison, there to "remain until further order, willing and requiring all "mayors, sheriffs, justices of the peace, headboroughs, con-"stables, and all other Her Majesty's loving subjects to be "aiding and assisting to you in the due execution of the premises, "as they tender Her Majesty's service, and will answer the con-"trary thereof at their peril; and this shall be to you and any of "you who shall do the same a sufficient warrant.

"Dated this twenty-first day of April, in the year of our Lord "one thousand eight hundred and sixty.

"To Mr. William Henry Allen, "the Tipstaff attending the High "Court of Chancery." } (Signed) "Campbell, C."

[This form has been obligingly furnished by Mr. Allen.]

We have now to consider whether any similar mode of proceeding is possible in the County Court in case, for instance, of the breach of an order in the nature of injunction. The 1st section of the statute enacts that the County Courts "shall have and exercise all the power and authority of the High Court of Chancery" in certain specified matters, among which proceedings for certain orders in the nature of injunctions are expressly enumerated (see Cl. 8). The 2nd section enacts that the judge of the County Court shall in all these matters "in addition to the powers and authorities now possessed by him have all the powers and authorities, for the purposes of the Act, of a judge of the High Court of Chancery." This language is, it is clear, wide enough to include the power of enforcing obedience by commitment in any case in which the Court of Chancery would do so, if the suit or matter were before it; and it would be contrary to the ordinary principles of construction to hold that this effect is curtailed by the 8th section, which refers only to a "writ or warrant of possession, writ or warrant of execution, or *other process of execution*." This process it is true can be carried into effect only through forms framed by the five judges under the 8th section. But no such restriction, it is submitted, applies to process of contempt, and the registrars or other parties must frame the necessary forms under Order XXIII., rule 25. Any other construction of the statute would render a County Court order in the nature of an injunction nugatory and even ridiculous, and utterly paralyse the exercise of the jurisdiction.

It is nevertheless to be regretted that no authorized forms of orders and warrants of committal have been promulgated. The question being one which concerns the liberty of the subject, it is not impossible that some judges may shrink from taking the decisive step of sending a man to prison while there remains the least shadow of a doubt as to their power in this respect. In the absence of any appointed forms, the following are submitted to the practitioner.

(*a*) Now "Whitecross Street."

The order of committal, if framed according to the form dopted in Chancery, would be as follows (Seton, 3rd Edit., 945. *Stephens* v. *Workman*, 1 N. R. 563):—

"Whereas the plaintiff on the day of obtained an order in the nature of an injunction, restraining the defendant, his servants, workmen and agents, from digging turf from the piece of land in the plaint mentioned: Now upon motion this day made by Mr. for the plaintiff [*if defendant appears*, and upon hearing Mr. for the defendant], and upon reading [*if the defendant does not appear*, an affidavit of X. Y. of filed the day of of service of notice of this motion upon the defendant,] the said order, an affidavit of, &c., of service of the said order upon the defendant, the affidavit of, &c. [*here enter the evidence, and if any witness be examined vivâ voce add*, and upon hearing the evidence of A., of, &c., taken by order of the Court upon his oral examination before this Court this day]; THIS COURT being of opinion, upon the facts disclosed by the said affidavits [and evidence], that the defendant has been guilty of a contempt of this Court by a breach of the said order in the nature of an injunction, DOTH ORDER that the defendant do stand committed to the gaol for his said contempt."

Order of committal.

It would seem to be in accordance with the general course of proceeding in the County Courts, that a warrant should be issued, addressed to the high bailiff and the keeper of the prison jointly. If this be so, the warrant should fully recite the order of committal, in order that any question as to the regularity or validity of the proceedings may be open to the prisoner on a *habeas corpus*. (See *Bushell's Case*, Vaughan, 137, and the observations of Lenman, C. J., in the Case of the Sheriff of Middlesex, 11 A. & E. 273, see p. 292.)

The following form is therefore suggested (see County Court Forms in Bankruptcy, No. 77):—

Warrant of committal.

"In the County Court of holden at on the day of .

"In the suit of A. B.

v.

C. D.

"WHEREAS the plaintiff on the day of obtained, &c. [*reciting the injunction as in the order of committal*]; AND WHEREAS by an order dated this day of , upon motion made by Mr. for the plaintiff, &c. [*as in order*], the Court, being of opinion upon the facts disclosed by the said affidavits [and evidence,] that the defendant had been guilty of a contempt of the Court by a breach of the said order in the nature of an injunction, did order that the defendant should stand committed to the gaol for his said contempt:—

"THESE ARE THEREFORE to will, require, and authorize you, the high bailiff and others, the bailiffs of this Court, immediately upon the receipt hereof, to take into your custody the body of the said defendant, and him safely to convey to Her Majesty's gaol of and there deliver him to the governor [*or* gaoler] thereof, together with this warrant; and the governor [*or* gaoler] of the said gaol is hereby authorized and required to receive the defendant into his custody and him safely to keep and detain until this Court, or the Vice Chancellor appointed to hear appeals in equity from this Court, or the High Court of Chancery, shall make order to the contrary.

ORD. XVI. *Suits and Proceedings.— Enforcement of Decrees and Orders.*

"Given under my hand and the seal of this Court this
"day of in the year of our Lord, 186 .
"To the high bailiff and
"others, the bailiffs of the said
"County Court, and to all peace
"officers, and to the governor [*or*
"gaoler] of Her Majesty's gaol
"at .

(L. S.) (Signed) "X. Y., Judge."

ORD XVII *Funds in Court.*

ORDER XVII.

FUNDS IN COURT.

RULE 1. Registrar to obey in the receipt and payment of monies under this Act the Treasury instructions.

1. All monies ordered to be paid into Court, shall be received by the registrar, and the duties of the registrar and the treasurer with respect to such monies shall be in all respects the same as if the monies received under the Act had been received under the authority of the County Court Acts now in force, and all instructions issued or to be issued by the Lords Commissioners of Her Majesty's Treasury shall apply to monies received under the Act unless therein otherwise directed.

RULE 2. Payment into Court.

2. Where money is directed to be paid into Court, the party directed, shall attend and pay the same into the office of the registrar, and obtain a receipt for the amount; and in case of stock, shares, or other securities, a transfer shall be made into the names of the registrar and treasurer of the Court less the broker's account and charges, and the certificate of transfer, together with such accounts, shall be filed in the office of the registrar, who, with the treasurer, shall hold such monies, stocks, shares, or securities in trust to attend the order of the Court.

RULE 3. Investment of monies under order of Court.

3. Where any party to a suit or proceeding is desirous of having any fund in Court in which he is interested, or any part thereof, invested, the Court may at any time order the investment thereof; and such funds may be invested in the purchase of Three per Cent. Consolidated Annuities, in the names of the treasurer and registrar of the Court for the time being, with or without the name of the person (if any) found or declared by the Court to be immediately entitled to the interest of the fund, and the Court may further order that the person (if any) so entitled shall from time to time receive the dividends thereof.

RULE 4. Interest on investments.

4. Where the investment is in the names of the treasurer and registrar alone, the registrar shall from time to time receive the dividends of all the funds so standing in their names, and shall reinvest the dividend in the same names, except where and so far as the Court shall otherwise direct, and shall apportion the amount so reinvested in his books to the right accounts.

RULE 5.

5. Where the sum to be invested in any case in the same

erest does not exceed 30*l.* in one year, the same may, if judge think fit, be deposited in the Post Office Savings nk in the name of the registrar for the time being, in st for the parties interested therein, and in such case the son (if any) entitled to the interest on such sum shall allowed to receive the annual addition made to the same way of interest, on such certificate or authority from the istrar as the Postmaster General may from time to time uire.

ORD. XVII *Funds in Court.*

Where sum less than 30*l.* it may be invested in Post Office Savings Banks.

6. Where any order has been made upon any person to to the Accountant General in Chancery any sum of ney under section 5 of the Act, such order shall be wn up by the registrar and issued to the bailiff of the urt, by whom the same shall be served personally upon person ordered to make the payment.

RULE 6. Service of order under s. 5 of the Act.

7. Where default shall be made in the production of the tificate of the Accountant General the registrar shall e notice in writing to the judge of the fact of such ault, and the judge may thereupon direct a warrant of ecution to issue in accordance with section 5 of the Act.

RULE 7. Where default made in payment to Accountant General of the Court of Chancery.

8. Where any married woman is interested in any prin- al money, stocks, shares, or securities exceeding in value 0*l.*, or 10*l.* in annual payments, she shall be examined by judge apart from her husband, to ascertain whether the ne shall be paid to him or made the subject-matter of a tlement, but if she be under age the Court shall order a per settlement to be made.

RULE 8. Married women.

A married woman is entitled to a settlement upon herself and children out of any personal property to which she is absoely entitled, and to which her husband becomes entitled in her nt during the coverture, if the property is in the custody of a urt of Equity, or of such a nature that a Court of Equity is tribunal in which the husband and those claiming under him st enforce their rights to it. (*Mitford* v. *Mitford*, 9 Ves. 87.) The foundation of the right is the principle, that he who seeks ity must do equity, and therefore a husband was not allowed the aid of a Court of Equity to obtain his wife's property ess he would submit to make a proper provision out of that perty for his wife and her children. Lord Hardwicke says, as ther would not have married his daughters without a provi-, neither will a Court of Equity who stands *in loco parentis* do (*Jewson* v. *Moulson*, 2 Atk. 417). Accordingly the right was at t confined to the cases in which the husband or his assignees imed the fund, or the trustees of the fund instituted prodings to distribute it under the sanction of the Court.

Equity to a settlement.

Origin of the right.

Since the case of *Elibank* v. *Montolieu*, 5 Ves. 737, the wife has vever been permitted actively to assert her right to a settlent by filing a bill by her next friend against the trustees or ecutors and her husband, claiming the fund and asking for a tlement. Still if, before bill filed, an executor or trustee ually pays the money to the husband, or transfers the fund o his name, the equity is gone. (*Murray* v. *Lord Elibank*, Ves. 84, see p. 90.) So also, if he do so pending a suit which

ORD. XVII *Funds in Court.*

is afterwards prematurely dismissed before decree, the payment or transfer cannot be impeached in another suit. (*Osborne* v. *Morgan*, 9 Ha. 432; *Wallace* v. *Auldjo*, 2 Dr. & Sm. 216, see p. 235, *ad fin.*; and see *ante*, p. 127.)

Waiver of equity to a settlement.

An adult married woman may waive her right to a settlement by appearing and consenting in Court in the manner pointed out by the rule. It is the duty of the Court to explain to her what she gets and what she loses by her consent (*Watson* v. *Marshall*, 17 Beav. 363). If she waives her right to a settlement there must also be an affidavit by the husband and wife of no settlement; or, if there is one, it must be sworn to as the only settlement, and their solicitor should swear, or their counsel should state at the bar, that he has carefully perused the settlement and that it does not affect the fund in question. (*Britten* v. *Britten*, 9 Beav. 143.)

How the equity is barred.

If an adequate settlement was made upon the wife on her marriage, her equity to a settlement will be barred. (*In re Erskine's Trusts*, 1 K. & J. 302.) If the wife is entitled to a settlement, but she and her husband, who is able and willing to maintain her, cannot come to any arrangement, the Court in general retains the fund and allows him to receive the income of the property during her life, thus giving the wife the chance of taking the *corpus* by survivorship. (*Sleech* v. *Thorrington*, 2 Ves. 562.)

Amount settled.

As against the assignees in bankruptcy of the husband, the general course is to order half to be settled. (*Bagshaw* v. *Winter*, 5 De G. & Sm. 466.) But under special circumstances, as if the husband has made no settlement on the wife (*Scott* v. *Spashett*, 3 Mac. & G. 599), or if he has already received a considerable fortune from his wife (*Gardner* v. *Marshall*, 14 Sim. 575), a greater portion, and even the whole, may be settled. So also if the fund is small and is barely sufficient to maintain the wife (*In re Kincaid's Trusts*, 1 Drew, 326.)

Nature of settlement.

Where a settlement is made, it is in general on the wife for life for her separate use, with remainder to such children as being sons shall attain twenty-one, or being daughters shall attain that age, or marry; with a gift over, in default of issue, to the wife absolutely if she survive her husband, or to the husband absolutely in case he be the survivor, or his assignee by name, if the title of the assignee has accrued before the date of the settlement (*Gent* v. *Harris*, 10 Ha. 383; *Carter* v. *Taggart*, 1 De G. M. & G. 286; 5 De G. & Sm. 55; *Spirett* v. *Willows*, 6 N. R. 364.)

Small fund retained in Court.

Where the fund is small, the Court of Chancery will, to save expense, instead of directing a settlement retain the amount which ought to be settled and pay the income to the separate use of the wife for life, and give liberty to apply, on her decease either with or without a declaration, who will then be entitled to the fund (*Bagshaw* v. *Winter*, 5 De G. & Sm. 468; *In re Cutler*, 14 Beav. 220.)

Right of the children.

The equity is personal to the wife, and if she dies before decree the children have no right. (*Wallace* v. *Auldjo*, 2 Dr. & Sm. 216; 1 De G. J. & S. 643.) The children have a right to have the decreed settlement made, if she die after decree and without having waived the right (*Murray* v. *Lord Elibank*, 13 Ves. 1); for she may, during her life, waive the right at any time before the settlement is actually executed. (*Fenner* v. *Taylor*, 2 Russ. & My. 190.)

ORD. XVII *Funds in Court.*

On the other hand, although the rule only directs an examination where the fund is under £200, or £10 a year, she is nevertheless entitled to a settlement out of a less fund if she insist upon it. (*In re Cutler*, 14 Beav. 220.) And if she do not, an affidavit shewing that the fund is not in settlement must be made. (*Hedges* v. *Clark*, 1 De G. & Sm. 354.)

Wife may insist on settlement, though fund under £200.

If the wife is entitled only to an equitable life interest in personal property, the Court will allow the husband properly maintaining her to receive the whole of the income, in opposition to her claim to have any portion secured to her separate use. (*Vaughan* v. *Buck*, 13 Sim. 404; see Lord Langdale's observations in *Wilkinson* v. *Charlesworth*, 10 Beav. 324, see p. 327; *Tidd* v. *Lister*, 10 Hare, 154, 3 De G. M. & G. 857.) If he deserts his wife, she is entitled to have a settlement or allowance made to her out of her life interest for her support. (*Gilchrist* v. *Cator*, 1 De G. & Sm. 188.) If by reason of his bankruptcy or insolvency he becomes unable to maintain her, she is also entitled to such settlement or allowance. (*Lumb* v. *Milnes*, 5 Ves. 717.) But the assignment of the husband while maintaining her will be good during their joint lives, even though he afterwards fail to maintain her. (*Elliott* v. *Cordell*, 5 Mad. 149; *Tidd* v. *Lister*, 3 De G. M. & G. 857.) Such an assignment does not defeat the wife's right by survivorship in case any part of the income is not reduced into possession pending the husband's life. (*Wilkinson* v. *Charlesworth*, 10 Beav. 324).

Generally wife not entitled to have life estate settled.

In the case of *Sturgis* v. *Champneys*, 5 M. & Cr. 97, it was held by Lord Cottenham that a married woman had a right to a settlement or allowance out of her life interest in realty, the legal estate being outstanding in mortgagees, against an assignee in insolvency claiming the life estate by a bill.

Settlement of real estate.

In *Barnes* v. *Robinson*, 32 L. J. Ch. 143, the wife was held entitled herself to sue for a settlement or allowance out of her equitable life estate in realty against her husband's assignees in insolvency.

Although the wife's equitable interest in realty is greater than a life estate, her right seems only to have an allowance out of it for her life (see *Durham* v. *Crackles*, 32 L. J., Ch. III.)

In *Hanson* v. *Keating*, 4 Hare, 1, as against a mortgagee of the wife's equitable term under a mortgage created by the husband, the wife was declared entitled to a provision for her life by way of settlement out of the mortgaged premises.

In *Wortham* v. *Pemberton*, 1 De Gex & Smale, 644, a married woman whose husband had misconducted himself and deserted her, was declared, upon her own bill, entitled to a provision by way of settlement out of real estate, of which she was tenant in tail, during the existence of a jointure term which made her interest equitable.

In *Gleaves* v. *Paine*, 1 De G. J. & Sm. 87, see p. 94, Lord Westbury said he was not disposed to extend the case of *Sturgis* v. *Champneys* (*loc. cit.*) any further than the actual decision went, and that as in that case the assignees were plaintiffs, it would extend the rule very much to recognise the doctrine that a wife might come asking a settlement of real estate belonging to the husband [in her right] against the husband's assignee, which the assignee could render available without resorting to the Court.

Of course, if the assignees in *Sturgis* v. *Champneys* had redeemed the mortgages they would not have required the assis-

ORD. XVII *Funds in Court.*

tance of the Court; and if they had filed a bill to redeem, Lady Champneys would not have been a necessary party. (*Riley* v. *Croydon*, 2 Dr. & Sm. 293.) It is doubtful whether she could have filed a bill to redeem, and whatever may be the rule of the Court as to a wife's right to assert by bill her equity to an allowance or settlement out of real estate, where the legal interest is in trustees, when the legal interest is in mortgagees only, Lord Westbury's observations are entitled to great weight. In addition to the cases cited, see *Griggs* v. *Gibson*, (No. 1), 1 L. J. Notes, 105.

ORD. XVIII. *Transfer of Proceedings to Court of Chancery.*

ORDER XVIII.

TRANSFER OF PROCEEDINGS TO COURT OF CHANCERY.

Transfer to Court of Chancery where subject-matter exceeds the amount to which jurisdiction is given by Act.

If during the progress of any inquiry under order of the Court it shall be made to appear that the subject-matter of the suit or proceeding exceeds the amount to which the jurisdiction of the Court is limited, the registrar may proceed with the particular account or inquiry which is then before him, unless he thinks it inexpedient so to do, but he shall at the next sitting of the Court present a certificate of the state of the suit and proceedings, and if the judge shall be of opinion that such excess exists, he shall make an order for the transfer of the suit or matter to the Court of Chancery; and the registrar shall make and file with the record a copy of such certificate and order, and shall transmit the original, together with the order of the judge thereupon, under the seal of the Court, by post or otherwise, to the office of the Clerk of Records and Writs in Chancery, or to such other office or officer as the Lord Chancellor may by general order direct, and shall also send notice, by post or otherwise, of the fact, to all parties and persons entitled to be served with a copy of the decree.

ORD. XIX. *Appeal.*

ORDER XIX.

APPEAL.

RULE 1. Appeal to be by case. 13 & 14 Vict. c. 61, ss. 14, 15 & 16, and ss. 18 & 19 of the Act.

1. Where any party desires to appeal under section 18 of the Act against the determination or direction of a judge of a County Court, such appeal shall be had in accordance with the provisions of section 15 of 13 & 14 Vict. c. 61, upon a case to be stated for the opinion of the Vice Chancellor appointed in that behalf by the Lord Chancellor.

The 14th section of the 13 & 14 Vict. c. 61 confers the right of appeal in common law cases.

Sects. 15 and 16 are as follow:—

Sect. 15. And be it enacted, that such appeal shall be in the form of a case agreed on by both parties or their attornies, and if they cannot agree the judge of the County Court, upon being applied to by them or their attornies, shall settle the case and

ign it; and such case shall be transmitted by the appellant to he rule department of the Master's office of the Court in which he appeal is to be brought. ORD. XIX. *Appeal.*

Sect. 16. And be it enacted, that no judgment, order, or letermination given or made by any judge of a County Court, ior any cause or matter brought before him or pending in his Court, shall be removed by appeal, motion, writ of error, *certiorari*, r otherwise, into any other Court whatever, save and except in he manner and according to the provisions hereinbefore men- ioned.

2. The notice of appeal shall be in writing, and shall be igned by the appellant, his counsel or attorney, and such iotice shall be sent, together with the statement of the rrounds, by post or otherwise, to the registrar as well as to he successful party. RULE 2. Notice of appeal.

3. The pendency of an appeal shall not operate as a stay of proceedings, but the Vice Chancellor to whom such ppeal is made, or the judge from whose decree or order the ppeal is made, may stay the proceedings pending the ppeal, on such terms as to giving security or otherwise as o such Vice Chancellor or judge may seem fit. RULE 3. Proceedings not to be stayed unless Vice Chancellor or judge otherwise order.

See however Order XX., r. 8.

4. The appellant shall prepare the case for appeal, and ll cases on appeal shall, unless the judge shall otherwise rder, be presented to him for signature at the Court held ext after the parties shall have agreed upon the same; nd if the judge approves thereof it shall be signed by him, nd sealed with the seal of the Court; but where the judge oes not approve of the case submitted to him, both parties hall be summoned to attend him where and when the judge hall appoint, and at the place and time so appointed both arties shall be heard as to the form of the case, and the udge shall finally settle and sign the same, and it shall then e sealed by the registrar. RULE 4. Case to be signed by judge.

5. Where the parties do not agree upon the form of the ase to be stated, the appellant shall lodge with the registrar he draft case prepared by him, and the registrar shall give iotice to the parties that the same has been so lodged, and vill, on a day to be named in the notice, be presented to he judge for his signature, and on such day the parties nay appear before the judge, who shall determine the form f the case, and finally settle and sign the same, and it hall then be sealed by the registrar. RULE 5. When parties do not agree on case, judge to settle same.

6. When the case shall be so signed and sealed, a copy hereof shall be deposited with the registrar, and another ent by post or otherwise by the appellant to the successful arty within three clear days next after the time of signing nd sealing the same, and if the appellant do not comply ith this rule the successful party may proceed upon the ecree or order unless the judge shall otherwise direct. RULE 6. Copy of case deposited with registrar.

ORD. XIX. *Appeal.*

RULE 7. Case to be transmitted.

7. The appellant shall, within three clear days next after the case has been signed and sealed, transmit the same with a copy thereof under the seal of the Court, by post or otherwise, to the office of the clerks of records and writs in Chancery, or to such other office or officer in the Court as the Lord Chancellor may by general order direct, and shall give notice, by post or otherwise, to the successful party that he has done so; in default whereof the successful party may proceed on the decree or order, and shall, on the application to the Court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings; provided that, instead of proceeding on such decree or order, the respondent, if he think fit, may, within twenty-eight days from the signing and sealing of the case, transmit it in the manner prescribed, and give the like notice to the appellant of such transmission.

RULE 8. If appeal not prosecuted successful party to proceed.

8. If, after the case has been transmitted, the appellant do not prosecute his appeal, the Court of appeal may dismiss the same for want of prosecution, and thereupon the decree or order appealed from may be prosecuted and enforced as if there had been no such appeal, and the respondent in the appeal shall be entitled to all costs he may have incurred by reason of the appeal, to be recovered as costs in the Court below.

RULE 9. Entering judgment on appeal.

9. When the Court of Appeal shall have made a decree or order either party may deposit the same, or an office copy thereof, with the registrar of the County Court, and upon being so deposited such decree or order shall be filed and may be enforced as if it had been made by the County Court.

RULE 10. Appeal to Lancashire Court of Chancery.

19. All the rules of this Order shall apply to appeals under section 19 of the Act to the Court of Chancery of the County Palatine of Lancaster, and the Vice Chancellor thereof, except that the case when signed and sealed shall be transmitted to the registrar of that Court.

ORD. XX. *Duties of Registrar.*

ORDER XX.

DUTIES OF REGISTRAR.

RULE 1. Registrar to keep books and enter proceedings therein.

1. The registrar shall keep a book, to be called "The Suits and Proceedings in Equity Book," and shall enter and number in such book each suit or proceeding consecutively in the order in which they are entered, and shall also enter therein a note of all documents filed and steps taken in such suit or proceeding.

RULE 2. Document to be distinguished by the number of the plaint and letters.

2. Upon the filing of any document it shall be distinguished by the number of the plaint or petition in respect of which it is filed being endorsed thereon, and it shall be further distinguished from other documents filed in the suit or proceeding by placing after the number a distinctive letter of the alphabet.

3. Where a registrar rejects an affidavit under Order LIV., he shall give notice, by post or otherwise, to the party offering the same for filing, of and the reasons for such rejection; and where any other document is so imperfect upon the face thereof, or by reason of having blanks therein, that it cannot be easily read or understood, the registrar may refuse to file and may return the same, by post or otherwise, to the party offering the same, to be re-written, or the blanks filled up.

ORD. XX. *Duties of Registrar.*

RULE 3. Duty of registrar when he rejects affidavits, or where documents are imperfect.

4. Before any summons, notice, or other document, or any copy thereof, shall be issued by the the registrar, the same shall be sealed with the seal of the Court.

RULE 4. Summons, &c., to be sealed.

5. When the registrar is required by any decretal order to make inquiries or to take accounts, he shall appoint some day, being not less than twenty-one days from the date of such order, to sit in his office or at the Court to hear and determine all matters relating to such inquiry and accounts, and he shall forthwith prepare and insert advertisements in conformity with such order, stating the time, place, and purpose of such sitting, and shall insert the same fourteen days previous to such sitting.

RULE 5. Registrar to appoint time and place for inquiries and taking accounts.

6. Upon the day so appointed the registrar shall sit at the time and place appointed, and shall hear all parties interested, their counsel or attorneys.

RULE 6. Hearing before registrar.

7. Where a registrar is not prepared to certify to the Court on the day mentioned in the order, he shall apply to the judge for an extension of time, and state the reason for making the application, and he shall give notice, by post or otherwise, to the parties of the enlargement of the time and of the day on which he is to certify.

RULE 7. Further time for certificate.

8. Whenever a notice for appeal is given, the registrar shall detain the proceeds of any execution which may then be in or may come into his hands pending such appeal, to abide the event of such appeal, unless the judge shall otherwise order.

RULE 8. Registrar to retain money to abide result of appeal.

ORDER XXI.

ORD. XXI. *Duties of High Bailiff.*

DUTIES OF HIGH BAILIFF.

1. Where any personal property is directed to be sold by auction, the high bailiff shall superintend the sale; and where the property is to be sold by private contract he shall carry out the directions of the Court in respect of such sale.

RULE 1. As to sale of personal property.

2. The high bailiff shall serve all documents issued to him by the registrar for service, and execute all warrants.

RULE 2. Services and executions.

3. Where a warrant shall direct the high bailiff to take possession of, without selling or delivering to a party, any goods or chattels, he shall make or cause to be made an inventory or appraisement of the goods or chattels which he may take into his possession, and may, upon receiving as

RULE 3. Possession.

ORD. XXI. *Duties of High Bailiff.*

a deposit the amount of such appraisement or sufficient security, to be approved by the registrar, for the safe custody, and for the delivery up of possession upon request, of such goods and chattels, relinquish the possession thereof on condition that the same shall be re-delivered to him or held to abide the order of the Court.

RULE 4. Payment over of money.

4. All monies coming into the hands of the high bailiff shall be paid over by him to the registrar to the credit of the suit or proceeding in which the same was so received by him within twenty-four hours after he shall have received the same.

ORD. XXII. *Duties of Receiver.*

ORDER XXII.

DUTIES OF RECEIVER.

RULE 1. Receiver to give security.

1. Every receiver appointed by the Court, other than the high bailiff, shall give such security by bond to the registrar for the faithful discharge of his duties, and the payment over of money, as the Court shall direct.

The form of bond is given in the Schedule No. 33.

RULE 2. His accounts to be audited by registrar, and when.

2. The receiver shall submit to the registrar, and the registrar shall audit, the accounts of the receiver, which need not be in any particular form, as soon as conveniently may be after the receipt or realization of the assets, and immediately after such audit shall pay over to the registrar the balance found thereby to be in his hands.

The usual form of receiver's account in the Court of Chancery is given in the Schedule to the Regulations of August 8, 1857, No. 15.

RULE 3. To produce voucher and if required verify on oath.

3. The registrar may require any receiver to produce any receipt, accounts, and vouchers necessary for verifying the accounts, and may disallow any item not proved to his satisfaction, and may, if he shall think fit, require any receiver to verify such accounts and vouchers upon oath.

RULE 4. To produce account for audit upon notice.

4. The receiver shall, at any time before the complete realization of the assets, produce his accounts to be audited in manner provided by this order, upon receiving seven days notice in writing from the registrar so to do, and such notice may be sent by post or otherwise to the address of the receiver.

RULE 5. Audit once a year.

5. Where the duties of the receiver are continuous, no longer period than one year shall in any case be allowed to intervene between each audit.

RULE 6. Parties need not attend audit.

6. In no case shall it be necessary for any party to attend at the audit of the receiver's account, but where a party is dissatisfied with a receiver's account he may apply to the

court or registrar for a revision of the registrar's allowances. ORD. XXII. *Duties of Receiver.*

7. The Court may order the receiver to pay over, at such time or from time to time as it shall see fit, to the party entitled to the beneficial interest therein, or to the guardian of any infant, any yearly or other accruing rents or interest instead of paying the same into Court, and to take credit for such payments in his accounts when audited. RULE 7. Court may order income to be paid direct to parties.

ORDER XXIII. ORD. XXIII. *Practice.*

PRACTICE.

1. All plaints, petitions, statements, and documents whatsoever in any suits or matter under the Act which are required to be filed shall be on foolscap paper, and may be wholly or partly printed or written, and dates and sums occurring therein may be expressed in figures. RULE 1. Proceedings may be wholly or partly printed.

2. All judicial or official documents in any suit or proceeding, and all copies thereof respectively issued by the Court, shall be stamped by the registrar with the seal of the Court. RULE 2. Documents to be sealed.

3. Every document, the mode of serving which is not specially defined by these orders, may be served, and the service thereof may be proved, in conformity with the practice that has heretofore prevailed in the County Courts as to the service of summonses, excepting so far as the same relates to the time of service. RULE 3. Service.

4. Where any party to a suit or proceeding changes his attorney he shall give notice in writing of such change to the registrar, stating the name or firm and place of business of the new attorney, and the registrar shall file the notice. RULE 4. Change of attorney.

5. No suit or motion for a decree or decretal order shall be heard until the same shall be set down for hearing. RULE 5. Setting down for hearing.

A fee of £1 is payable on setting down for hearing. See the Schedule to the Act.

6. The times of the sitting of a County Court in matters of equity shall be those appointed for the transaction of the general business of the Court, unless the judge shall otherwise order and shall appoint a special day or days for a sitting of the Court in matters of equity. RULE 6. Days for equity sittings.

7. Where any party to any suit or proceeding is unacquainted with the Christian name of any person whose name he desires to insert in any plaint, proceeding, or document, he may describe such person by his surname, or by his surname and the initial of his Christian name, or by such name as he is generally known by. RULE 7. Where Christian name unknown.

See also Order I., r. 2.

ORD. XXIII. *Practice.*

RULE 8. Copy of documents for use of judge.

8. Where any proceedings or documents are filed an extra copy, in addition to the copies to be delivered under these orders, shall be left with the registrar for the use of the judge.

RULE 9. Copies of proceedings to forwarded to judge.

9. The registrar shall transmit by post, prepaid, to the judge, five days before the sitting of the Court, all copies of proceedings and documents left for his use under these orders.

RULE 10. Registrar to prepare all copies.

10. Copies of all proceedings or documents shall be prepared by the registrar for any person requiring the same, upon payment of the costs of such copies when the order for the same is given.

RULE 11. Acts may be done by counsel or attorney.

11. Where by these Orders any act is to be, or may be, done by any party to a suit or proceeding, such act may be done either in person or by his attorney.

RULE 12. Service on attorney sufficient, except where personal service is required.

12. Where a party acts by attorney, service of any proceeding or document upon such attorney, or delivery of the same at his office, or sending the same to him by post, shall be good service upon the party for whom such attorney acts, as upon the day when the same is so served or delivered, or upon which in the ordinary course of post it would be delivered, except in cases where by these orders personal service upon a party is required.

RULE 13. Service may by leave of the registrar be effected by the attorney.

13. Any proceeding or document may, by leave of the registrar, be served by the attorney of the party requiring to effect such service; but the costs of such service, and proof thereof, shall not be allowed, except by order of the judge.

RULE 14. Substituted service.

14. Where by reason of the absence of any party, or from any other sufficient cause, the service of any summons, notice, proceeding, or document cannot be made, or ought in the opinion of the judge to be dispensed with, the judge may wholly dispense with such service, or may, at his discretion, order any substituted service or notice by advertisement or otherwise in lieu of such service.

See also Order I., r. 9.

RULE 15. Judge to order in what newspapers advertisements to be inserted and costs thereof to be prepaid.

15. The judge shall order in what newspaper any advertisements which may from time to time be ordered in any suit or proceeding shall be inserted; and when there is no fund in Court, the expense of such advertisements shall be paid to the registrar by the party requiring the same before they are inserted.

RULE 16. Advertisements in *London Gazette*.

16. All advertisements to be inserted in the *London Gazette* shall be transmitted to the registrar of County Court Judgments in London, who shall cause them to be classified and inserted in lists under the direction of the Commissioners of Her Majesty's Treasury.

RULE 17. Conduct of suit.

17. The judge may order what party shall have the conduct of any suit or proceeding, or any part thereof and

may rescind or alter such Order, or make new Orders in that behalf, from time to time as he shall think fit.

RULE 18. Court may enlarge or abridge periods mentioned in these Orders.

18. The judge may, if he think fit, enlarge or abridge any of the times fixed by these Orders for taking any step or filing any document, or giving any notice, in any suit or proceeding.

RULE 19. Undertaking by next friend to pay costs.

19. Before the name of any person shall be used in any suit or proceeding as next friend of any infant, married woman, or other party, such person shall sign an undertaking, in the form given in the schedule (*a*), to be responsible for any costs to which the plaintiff or applicant may become liable in the course of the suit or proceeding, and such undertaking shall be annexed by the registrar to the plaint or petition.

Non compos may sue by next friend.

A person of weak intellect, but not found a lunatic by inquisition, may sue by a next friend (*Light* v. *Light*, 25 Beav. 248, and see Seton, 709, no. 11.)

Next friend of married woman.

The next friend of a married woman must be a substantial person (*Hinde* v. *Whitmore*, 2 K. & J. 458), and on proof that he is not, the suit will, on motion, be stayed till he gives security for costs and another substantial next friend is substituted. (*Smith* v. *Etches*, 1 H. & M. 711.) But a married woman not having any property under her own control of greater value than £5, may sue in *formâ pauperis* without a next friend. (*Hinde* v. *Whitmore* (*loc. cit.*), *Smith* v. *Etches*, 3 N. R. 457.)

Constitution of suit where married woman party.

Whenever a married woman is a party to a suit her husband must also be a party.

If the suit relates to property to which the husband and wife are entitled in right of the wife, they must join as co-plaintiffs, and the suit is the husband's suit. But if the suit relate to the wife's separate estate, she must be plaintiff by her next friend, and her husband a defendant (*Hope* v. *Fox*, 1 J. & H. 54) if he claims an adverse interest: if he does not he may be a co-plaintiff. *Beardmore* v. *Gregory*, 6 N. R. 23. If husband and wife are made co-defendants, the wife may in the Court of Chancery obtain an order to defend separately if the suit concern her separate estate, or if she has an interest adverse to her husband, and also in some other special cases, as to which see Dan. 4th edit., p. 178.

As to amending see Ord. XIII., and C. C. Rule 96, *supra* pp. 351, 352.

RULE 20. Transfer of suits or proceedings from one Court to another in certain cases.

20. Where suits or proceedings shall be commenced in different Courts by parties in the same interest, such suits or proceedings shall be transferred to the Court in which the first plaint or petition was filed, and shall there be proceeded with in the same way in all respects as if they had been commenced in that Court.

RULE 21. Taxing officer.

21. The registrar shall be the taxing officer of the Court.

RULE 22. Interest on debts.

22. Creditors are to be entitled to interest in respect of debts, as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of 4*l.* per cent. per annum, from the date of the decretal order, and to costs of successfully proving such debts according to the scale of costs in that behalf.

(*a*) No. 1.

ORD. XXIII. *Practice.*

RULE 23. Interest on legacies.

23. Interest is to be computed on legacies after the rate of 4*l.* per cent. per annum, from the end of one year from the date of the testator's death unless otherwise ordered or a different rate is directed by the will.

RULE 24. Decrees to be registered, sect. 15.

24. A note of every decretal order or final decree made in any suit, or of an order made on a petition, shall be transmitted to the Registrar of County Court Judgments in London, who shall register the same under the direction of the Commissioners of Her Majesty's Treasury.

RULE 25. Forms.

25. All proceedings and documents may be in forms similar to the forms in the Schedule to these Orders where the same are applicable; and in cases where no forms are provided, parties shall frame the proceedings or documents, using as guides those contained in the schedule.

RULE 26. General practice rule.

26. The rules and forms and practice heretofore in force in the County Courts shall, subject to these Orders, be adopted with reference to suits and proceedings in equity, so far as they shall be respectively applicable.

ORD. XXIV. *Interpretation.*

ORDER XXIV.

INTERPRETATION.

In these orders the following words shall have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction (viz.):—

"The Act." (1.) The words "the Act" shall mean 28 & 29 Vict. c. 99:

Gender. (2.) Words importing the masculine gender shall include females:

Number. (3.) Words importing the singular number shall include the plural, and *vice versâ*:

"Party." "Person." (4.) The word "party" shall mean a party to a suit or proceeding; and "person" shall mean any person, whether a party to the suit or proceeding or not; and the words "person" or "party" shall include a body politic or corporate:

"Affidavit." "Sworn." (5.) The word "affidavit" shall include statuable affirmations, and attestations upon honour, and the word "sworn" shall include affirmed according to the statute and attested upon honour:

"Days." (6.) Where any number of days is mentioned, it shall mean "clear days:"

"Court." "Judge." "Registrar." (7.) The word "Court" shall mean the County Court having jurisdiction in the suit or proceeding, and the words "Judge" and "Registrar" shall respectively mean the Judge and Registrar of that Court:

(8.) The words "High Bailiff" shall include any assistant bailiff lawfully appointed by the high bailiff, and the word "Bailiff" shall include High Bailiff.

ORD. XXIV. *Interpretation.*

"High Bailiff."

"Bailiff."

J. B. DASENT.
D. D. HEATH.
J. WORLLEDGE.
RUPERT A. KETTLE.
WILLIAM FURNER.

I approve of these Orders and Forms to come into force in all County Courts on the 1st day of October, 1865.

CRANWORTH, C.

SCHEDULE OF FORMS

TO THE

COUNTY COURT ORDERS IN EQUITY

FOR REGULATING THE

PRACTICE OF THE COUNTY COURTS.

1.

Undertaking by next friend of infant to be responsible for defendant's costs.

Undertaking by Next Friend of Infant to be responsible for Defendant's Costs.

In the County Court of holden at .

I, the undersigned , being the next friend of *A.B.*, who is an infant, and who is desirous of entering a plaint [*or* of taking proceedings] in this Court against *C.D.* of, &c., hereby undertake to be responsible for the costs of the said *C.D.* of, &c., in the cause, and that if the said *A.B.* fail to pay to the said *C.D.*, when and in such manner as the Court shall order, all such costs of such cause as the Court shall direct him to pay to the said *C.D.*, I will forthwith pay the same.

Dated this day of

(Signed)

2.

Affidavit in support of application for substituted service.

Affidavit in support of Application for substituted Service.

In the County Court of holden at .

In the suit of *A.B.* v. *C.D.*

I, *J. S.* of [*address and description*], make oath and say as follows:—

State facts showing that defendant has been within the jurisdiction of the County Courts at some time not more than two years before the plaint was filed, and that he is beyond the seas. Or, that upon inquiry at his usual place of abode (if he had any), or at any other place or places where prior to the

me when the plaint was filed he might probably have been et with, he could not be found so as to be served, and that in ither case there is just ground to believe that he has gone out f the realm or otherwise absconded to avoid being served, and hat service on J. N. will be effective to reach C. D.

Affidavit in support of application for substituted service.

Then state deponent's means of knowledge of the facts eposed to.

Sworn, &c.

3.

ORDER FOR SUBSTITUTED SERVICE.

Order for substituted service.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It appearing to me, upon the affidavit of that it is esirable for the purposes of this suit that service of the laint be made upon at , and that such service e deemed good service on the defendant *C.D.*, I do order hat service of the plaint and summons in this suit be leemed good service upon the said defendant *C.D.*

Dated this day of .

J.S., Judge.

4.

ADMINISTRATION.—[Clause 1 of Section 1.]

Administration.—[Clause 1 of Sect. 1.]

By Creditor.

Plaint in Equity.

In the County Court of holden at .

A.B. of, &c. [*address and description*], Plaintiff.

and

C.D. of, &c. [*address, and description*], Defendant.

A.B., the above named plaintiff, states as follows :—

1. *E.F.* late of was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. The said *E.F.* duly made his last will, dated the day of and thereof appointed *C.D.* executor [*or* devised his estate in trust, &c., *or* died intestate, *as the case may be*].

3. The said will was duly proved by the said *C.D.* [*or* letters of administration were granted, &c.]

4. The defendant has possessed himself of the personal [and real *or* the proceeds of the real] estate of the said *E.F.*, and has not paid the plaintiff his said debt.

5. The said *E.F.* died on or about the day of and had his last place of abode within the jurisdiction of this Court. [*Omit this if C.D. has his place of abode within the jurisdiction of this Court.*]

6. The whole of the personal [and real] estate of the said *E.F.* does not exceed in amount [*or* value] the sum of 500*l.*

7. The plaintiff prays that an account may be taken of the personal [and real] estate of the said *E.F.* deceased, and that the same may be duly administered under the

Administration.—[Clause 1 of sect. 1.]

decree of the Court, and for such further or other relief as the Court may think fit.

This plaint was filed by
of
Attorney for the Plaintiff,
or by of .

By Legatees (Specific.)

Omit paragraph 1, and commence paragraph 2, *E.F.*, late of duly made his last will, dated the day of and thereof appointed *C.D.* executor, and by such will bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4, substitute—

The defendant is in possession of the personal estate of the said *E.F.*, and, *inter alia*, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7, substitute—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, *&c.*

By Legatees (Pecuniary.)

Omit paragraph 1, and substitute for paragraph 2, *E.F.*, late of duly made his last will, dated the day of and thereof appointed *C.D*, executor, and by such will bequeathed to the plaintiff a legacy of £ .

In paragraph 4, substitute "legacy" for "debt."

By Legatees (Residuary.)

Omit paragraph 1, and substitute for paragraph 2, *E.F.*, late of duly made his last will, dated the day of , and thereof appointed *C.D.* executor, and by such will bequeathed to the plaintiff the residue [*or* a part of the residue] of his personal [*or* and the proceeds of his real] estate.

In paragraph 4, substitute "the residue [*or* share of residue] so bequeathed" for "said debt."

Next of Kin.

For paragraphs 1, 2, 3, and 4, substitute—

1. *E.F.* late of was at the time of his death possessed and entitled of personal estate.

2. He died on or about the day of intestate.

3. Letters of administration were duly granted to the defendant, and that he has possessed himself of the personal estate of the deceased [*leave out* "letters of administration were duly granted to the defendant, and that" *if none have been granted*].

4. That the plaintiff is next of kin [*or* one of the next of kin] of the said *E.F.*

5.

Execution of trusts.—[Clause 2 of sect. 1.]

EXECUTION OF TRUSTS.—[Clause 2 of Section 1.]

Plaint in Equity.

In the County Court of holden at .

A.B. of, &c. [*address and description*] - - Plaintiff,

and

C.D. of, &c. [*address and description*], the *or* one of the cestui que trusts (*see Rule* 6 *of* 15 *&* 16 *Vict. cap.* 86, *sec.* 42.) - - Defendant.

A.B., the above named plaintiff, states as follows :—

1. He is one of the trustees under a deed of settlement bearing date on or about the day of made upon the marriage of the said *E.F.* and *G.H.*, the father and mother of the defendant [*or* a deed of assignment of the estate and effects of *E.F.* for the benefit of *C.D.* the defendant, and other the creditors of *E.F.*]

2. The said *A.B.* has taken upon himself the burden of the said trust, and is seized of [*or* in possession of *or* of the proceeds of] the lands, tenements, and hereditaments, [goods and chattels], conveyed [*or* assigned] by the before mentioned deed.

3. The trust estate [*or* fund] does not exceed in amount [*or* value] the sum of 500*l.*

4. The said *C.D.* claims to be entitled to a beneficial interest under the before mentioned deed.

5. The plaintiff is desirous to account for all the rents and profits of the said lands, tenements, and hereditaments [and the proceeds of the sale of the said *or* part of the said lands, tenements, and hereditaments, *or* goods and chattels, *or* the proceeds of the sale of *or* part of the said goods and chattels, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of said trust estate may be administered in the Court for the benefit of the said *C.D.* the defendant, and all other persons who may be interested in such administration, in the presence of the said *C.D.*, and such other persons so interested as the Court may direct, or that the said *C.D.* may show good cause to the contrary.

This plaint was filed by
of
Attorney for the Plaintiff,
or by .

[*N.B.—Where the suit is by a cestui que trust the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.*]

6.

Foreclosure.—[Clause 3 of sect. 1.]

FORECLOSURE.—[Clause 3 of Section 1.]

Plaint in Equity.

In the County Court of holden at .

Foreclosure —[Clause 3 of sect. 1.]

A.B. of, &c. [*address and description*] - Plaintiff.
and
C.D. of, &c. [*address and description*] - Defendant.

A.B., the above named plaintiff, states as follows:—

1. By an indenture of mortgage bearing date on or about the day of 18 , a freehold [copyhold *or* leasehold] cottage, with the garden and appurtenances, situated within the jurisdiction of this Court, were conveyed [*or* assigned] by the defendant to him the plaintiff, his heirs [*or* executors, administrators,] and assigns, for securing the principal sum of £ together with interest thereon after the rate of 5*l.* per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of £ for principal and interest on the said mortgage.

3. The plaintiff prays that the Court will order the defendant to pay him the said sum of £ with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed, or that the said premises may be sold, and the proceeds applied in and towards the payment of the said principal, interest, and costs; and he prays that for that purpose all proper directions may be given and accounts taken by the Court.

This plaint was filed by
of
Attorney for the Plaintiff,
or by

Redemption.

REDEMPTION.

Transpose parties and also the facts in paragraph 1.

For paragraph 2 substitute—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of £ which the plaintiff is ready and willing to pay to the defendant, of which the defendant before filing this plaint had notice.

For paragraph 3 substitute—

The defendant prays that he may redeem the said premises, and that the defendant may be ordered to reconvey [*or* reassign] the same to him upon payment of the said sum of £ and interest, with such costs as the Court may order (if any), upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such reconveyance [*or* assignment], and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

7.

SPECIFIC PERFORMANCE.—[Clause 4 of Section 1.]

Specific performance.—[Clause 4 of sect. 1.]

Plaint in Equity.

In the County Court of holden at

A.B. of, &c. [*address and description*], Defendant,

and

C.D. of, &c. [*address and description*], Plaintiff.

A.B., the above named plaintiff, states as follows:—

1. By an agreement dated the day of and signed by the above named defendant *C.D.*, he the said *C.D.* contracted to buy of [*or* sell to] him certain freehold property, therein described and referred to, for the sum of £ .

2. He has applied to the said *C.D.* specifically to perform the said agreement on his part, but that he has not done so.

3. The said *A.B.* has been and still is ready and willing specifically to perform the agreement on his part, of which the said *C.D.* has had notice.

4. The plaintiff prays that the Court will order the said *A.B.* specifically to perform the said agreement, and to do all acts necessary to put the said *A.B.* in full possession of the said property [*or* to accept a conveyance and possession of the said property], and to pay the costs of the suit.

This plaint was filed by of Attorney for the Plaintiff, *or* by

[*N.B.—In suit for delivery up to be cancelled of any agreement, omit paragraphs* 2 *and* 3, *and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled, such as that the plaintiff signed it by mistake, under distress, or by the fraud of the defendant, and alter the prayer according to the relief sought.*]

8.

UNDER TRUSTEE RELIEF ACT.—[Clause 5 of Section 1.]

Under Trustee Relief Act—[Clause 5 of sect. 1.]

Proceeding in Equity.

In the County Court of holden at .

In the matter of

The petition of *A.B.* of, &c. [*address and description*].

Showeth,

1. That by a deed of settlement bearing date the day of made upon the marriage of *C.D.* with *E.F.*, certain freehold property in the settlement mentioned was conveyed to [*or* that *C.D.* deceased, by his will bearing date the day of and proved on the day of by your petitioner and *G.H.* in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to] the peti-

Under Trustee Relief Act—[Clause 5 of sect. 1.]

tioner, together with *G.H.*, upon certain trusts, *inter alia* [*here set out the clause or portion of the trust deed or will upon which the order of the Court is required*].

2. That the said *G.H.* died on or about the day of leaving the petitioner surviving trustee.

3. That disputes and doubts have arisen under the clause before set out, as to whether [*here set out the specific question upon which the opinion, advice, or direction of the Court is required*].

4. That the trust estate [*or* fund] to which this proceeding relates does not exceed in value the sum of 500*l.*

5. That the persons interested in this application are *I.J.* of, &c. [*address and description*], *K.L.* of, &c.

6. Your petitioner prays the Court to declare its opinion, advice, or direction whether [*here state specific question which the Court is asked to determine*].

This petition was filed by
of
Attorney for the Plaintiff,
or by

N.B.—By stat. 23 *&* 24 *Vict. c.* 38, *s.* 9, *this must be signed by Counsel.*

9.

Under Trustee Acts.

UNDER TRUSTEE ACTS.

Proceeding in Equity.

In the County Court of holden at .

In the matter of

The petition of *A.B.* of &c. [*address and description*],

Showeth,

1. That *C.D.*, deceased, by his will bearing date the day of and proved on the day of by your petitioner and *G.H.* in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to [*or* that by a deed of settlement bearing date the day of made upon the marriage of *C.D.* with *E.F.*, certain freehold property in the settlement mentioned was conveyed to] the petitioner, together with *G.H.*, upon certain trusts.

2. That the said *G.H.* died on or about the day of leaving the petitioner surviving trustee.

3. That the said trusts are still unexecuted, and that the petitioner is unable, by reason of having left the neighbourhood [*or* his bodily infirmity, *or any cause for relinquishing trust*], further to execute the said trusts; that it is for the advantage of the parties beneficially interested in the due execution of the trust that new trustees be appointed by the Court in the place of the petitioner.

4. That and of, &c. [*address and description*], are proper persons to appoint as such trustees.

5. That *I.J.* of, &c. [*address and description*], and *L.M.* of,

&c. [*address and description*], are the persons beneficially interested in the said trust. Under Trustee Acts.

6. Your petitioner prays that the said and or some other persons to be named by the Court, be appointed trustees in his place and stead, and that the cost of the proceeding be ordered to be paid out of the trust fund, and to give such directions as may be necessary for executing such order.

This petition was filed by
of
Attorney for the Plaintiff,
or by

10.

MAINTENANCE AND ADVANCEMENT OF INFANTS.
[Clause 6 of Section 1.]

Maintenance and advancement of infants.—[Clause 6 of sect. 1.]

Proceeding in Equity.

In the County Court of holden at .

In the matter of

The petition of *A.B.* of, &c. [*address and description*].

Showeth,

1. That he is guardian [*or* trustee] of *C.D.*, an infant, and that by the will of *E.F.* a sum of £ was bequeathed to the petitioner, upon trust to apply the income thereof to the maintenance and education of the said *C.D.* during his minority, and to pay the said principal sum of £ to the said *C.D.* upon his attaining the age of twenty-one years.

2. That the said *C.D.* is now of the age of fourteen years or thereabouts, and is now resident within the jurisdiction of this Court, and the petitioner has heretofore spent the whole of the accruing interest upon his maintenance and education.

3. That in the opinion of your petitioner it would be greatly to the interest and advancement of the said *C.D.* if a sum of £ part of the said principal money of £ was now expended by the petitioner in payment to *G.H.* of saddler, as a premium to the said *G.H.* to take and receive the said *C.D.* as his indoor apprentice.

4. The petitioner prays that he may direct him to use and appropriate the said sum of £ part of the said principal trust money or sum of £ for the apprenticeship of the said infant accordingly.

This petition was filed by
of
Attorney for the Plaintiff,
or by

11.

PARTNERSHIP.—[Clause 7 of Section 1.]

Partnership.—[Clause 7 of sect. 1.]

Plaint in Equity.

Partnership. —[Clause 7 of sect. 1.]

In the County Court of holden at
A.B. of, &c. [*address and description*], Plaintiff,
and
C.D. of, &c. [*address and description*], Defendant.

A.B., the above named plaintiff, states as follows :—

1. He and the said *C.D.*, the defendant, have been for the space of years [*or* months] last past carrying on business together at within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively, [*or* under a certain deed sealed and executed by them respectively, *or* under a verbal agreement between them, the said plaintiff and defendant].

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. The whole of the property, stock, and credits of such partnership do not exceed in value the sum of 500*l*.

4. The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [deed *or* agreement].

5. The plaintiff prays the Court to decree a dissolution of the said partnership, and that the accounts of the said partnership trading may be taken by the Court, and the assets thereof realized, and that each party may be ordered to pay into Court any balance due from him upon such partnership account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid out of the partnership assets, and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant, according to the terms of the said articles [deed *or* agreement], or that if the said assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment of and discharge of such debts, liabilities, and costs, and to give such other relief as the Court shall think fit.

This plaint was filed by
of
Attorney for the Plaintiff,
or by

N.B.—In suits for winding up of any partnership omit the prayer for dissolution ; but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.

12.

Notice of application for order in the nature of Proceeding in Equity.

NOTICE OF APPLICATION FOR ORDER IN THE NATURE OF INJUNCTION.—[Clause 8 of Section 1.]

injunction.—[Clause 8 of sect. 1.]

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

Take notice that I *A.B.* intend to apply at the sitting of the Court at aforesaid on the day of [*or* to Mr. Judge at his sittings at *or* at on the day of *as the case may be*] for an order in the nature of an injunction to restrain *C.D.* from further prosecuting an action which he has commenced against me in the Exchequer of Pleas to recover damages for the breach of the contract for the specific performance of which this suit was commenced [*or* to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us, for the winding up of which the suit was commenced, *or* from digging the turf from the land which was agreed to be sold by him to me by the agreement the specific performance of which this suit is commenced to enforce, *or as the case may be.*]

Dated this day of 186

A.B.

To *C.D.*

N.B.—Where the order in the nature of an injunction is to be applied for against a party whose name and address does not appear upon any proceeding already filed in the suit, it must be stated in full to enable the high bailiff to serve the notice.

[Suggested forms of orders of committal and warrants are given *supra*, p. 357.]

13.

SUMMONS ON PLAINT.

Summons on plaint.

No. of Plaint in Equity.

In the County Court of holden at .

(*Seal.*)

A.B. [*Address, description*], Plaintiff,
and
C.D. [*Address, description*], Defendant.

You are hereby summoned to appear at a County Court, to be holden at on the day of at the hour of in the noon, to show cause why the relief prayed for in the plaint hereunto annexed should not be granted.

Dated this day of 186

Registrar.

To *C.D.* defendant [*or one of the defendants*].

N.B.—If you do not attend either in person or by your attorney at the time and place above mentioned, such decree or order will be made and proceedings taken as the judge may think just and expedient.

Summons on plaint.

Endorsement on Summons.

If you desire to lessen the amount of costs which you may be put to, you should follow such of these directions as may apply.

If you desire to admit the truth of the allegations in the plaint, and to submit to the judgment of the Court, you may, at any time before the return day of the original summons, appear before the registrar, and in his presence sign an admission of the truth of the plaint, and a consent to abide by and perform any decree or order the Court may make.

If you desire to disclaim any interest in the subject-matter of the suit, or if you intend at the hearing to deny any of the statements in the plaint, or raise any question of law upon such statement without admitting the truth thereof, you may deliver to the registrar, within eight days after the service of the summons upon you, a statement signed by you to that effect.

If you intend to rely on a set-off, infancy, coverture, a statute of limitation, or a discharge under a bankrupt or an insolvent Act, as a defence, you must give notice of such special defence to the registrar five clear days before the day of hearing, and such notice must contain the particulars required by the County Court Rules, 1857; and you must deliver to the registrar as many copies of such notice as there are plaintiffs, and an additional copy for the use of the Court. If your defence be a set-off, you must, with each notice thereof, deliver to the registrar a statement of the particulars thereof.

Summonses for witnesses and for production of documents will be issued upon application at the office of the registrar of the Court, upon payment of the proper fee.

14.

Notice to admit and inspect.

NOTICE TO ADMIT AND INSPECT.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

Take notice that the plaintiff [*or* defendant *or* petitioner] proposes to adduce in evidence on the trial in this cause [*or* matter] the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff *or* petitioner], his attorney or agent, at on between the hours of ; and the defendant [*or* plaintiff *or* petitioner] is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been

served, sent, or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such document as evidence on such trial. Notice to admit and inspect.

Dated the day of .

G.H., Attorney for .

To *E.F.*, Attorney for .

ORIGINALS.

Description of the Documents.	Date.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

15.

APPLICATION FOR SUMMONS TO PRODUCE. Application for summons to produce.

In the County Court of holden at .

In the suit of *A.B.* v. *C.D.*

To the Registrar of the above Court.

I *A.B.* [*or C.D.*] hereby apply for a summons to issue, calling upon of to attend the Court upon the day of and then and there to produce the following documents.

A.B. [*or C.D.*]

ORIGINALS.

Description of the Documents.	Date.

Application for summons to produce.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

16.

Summons to witness.

SUMMONS TO WITNESS.

No. of Plaint in Equity.

In the County Court of holden at .

In the suit *A.B.* v. *C.D.*

You are hereby required to attend at [*Court House in*] on the day of 186 , at the hour of in the noon, to give evidence in the above cause on behalf of the [*plaintiff or defendant, as the case may be*], and then and there to have and produce [*the several documents hereunder specified*], and all other books, papers, writings, and other documents relating to the said action, which may be in your custody, possession, or power. In default of your attendance, you will be liable to a penalty of 10*l.*

Dated this day of 186 .

Registrar.

To

[*Here insert list of documents mentioned in the application for the Summons.*]

17.

Defendant's admission.

DEFENDANT'S ADMISSION.

In the County Court of holden at .

In the suit of *A.B.* v. *C.D.*

I, the undersigned defendant, admit the truth of the allegations in the plaint, and hereby submit to the judgment of the Court thereon.

(Signed) *C.D.*, Defendant.

Signed in the presence of

[*This paper marked* (A) *is the paper referred to in the annexed affidavit*]

18.

Affidavit of signature to defendant's admission.

AFFIDAVIT OF SIGNATURE TO DEFENDANT'S ADMISSION.

No. of plaint of Equity.

In the County Court of holden at .

In the suit of *A.B.* v. *C.D.*

Affidavit of signature to defendant's admission.

I, of gentleman, an attorney of Her Majesty's Court of at Westminster, make oath and say, that I was present on the day of one thousand eight hundred and sixty , and did see the above named *C.D.*, the defendant, sign the statement hereunto annexed, marked with the letter A, and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement as the witness attesting the same is in my handwriting.

Sworn at in the county of this day of one thousand eight hundred and sixty , before me

19.

DEFENDANT'S STATEMENTS.

Defendant's statements.

In the County Court of holden at .

In the suit of *A.B.* v. *C.D.*

I, the undersigned defendant [*or* one of the defendants], disclaim all interest under the will of the said *E.F.* in the plaint named [*or* as heir-at-law of, *or* as next of kin, *or* one of the next of kin of *E.F.* deceased in the said plaint named.]

Or, I the undersigned defendant state, that I admit [*or* deny] [*here repeat in the language of the plaint the statements admitted or denied.*]

Or, I the undersigned defendant, submit that upon the facts stated in the plaint, it does not appear that there is any agreement which can be legally enforced [*or* that it appears upon the said plaint that I am jointly liable with one *E.F.*, who is not a party to the suit, and not severally liable as by the plaint appears, *or* that it appears by the said plaint that *G.H.* should have been a joint plaintiff with the said *A.B.* in the said suit, *or as the case may be*].

Or, that the plaintiff has conveyed [*or* assigned] his interest in the said mortgage [*or* equity of redemption] to one *I.J.* [*or* that I have conveyed or assigned to *H.L.* by way of further charge for securing the sum of £ the equity of redemption in the property sought by the suit to be foreclosed].

Or, that since the dissolution of the partnership the plaintiff has executed a deed under seal, whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership trading, [*or as the case may be*].

(Signed) *C.D.*, Defendant.

Where filed by attorney add—

This statement was filed by of Attorney for the defendant.

20.

Decretal order.—Administration suit.

DECRETAL ORDER.—ADMINISTRATION SUIT.

In the County Court of holden at .
In the suit *A.B.* v. *C.D.*
Or
In the matter of the petition of *A.B.*

It is ordered that the following accounts and inquiries be taken and made; that is to say,

In Creditor's Suit.

1. That an account be taken of what is due to the plaintiff and all the other creditors of the deceased.

In Suits by Legatees.

An account to be taken of the legacies given by the testator's will.

In Suits by Next of Kin.

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next of kin [*or* one of the next of kin] of the intestate.

[*After the first paragraph, the Decretal Order will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, devisees, heirs-at-law, and next of kin. In suits by claimants other than creditors, after the first paragraph in all cases an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.*]

3. An account of the funeral and testamentary expenses.

4. An account of the personal estate of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part (if any) of the personal estate of the deceased are outstanding and undisposed of.

6. And it is further ordered, that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that if the registrar shall find it necessary for carrying out the objects of the suit to sell any part of the personal estate of the deceased, that the same be sold accordingly,

8. And that Mr. be receiver in the suit [*or* proceeding], and receive and get in all outstanding debts and outstanding personal estate of the deceased, and pay the same into the hands of the registrar, [and shall give security by bond for the due performance of his duties to the amount of £ .]

9. And it is further ordered, that if the personal estate of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken; that is to say,

10. That an inquiry be made what real estate the deceased was seised of or entitled to at the time of his death. Decretal order.—Administration suit.

11. What are the incumbrances (if any) affecting the real estate of the deceased, or any part thereof.

12. An account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

13. And that the real estate of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold, with the approbation of the judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

14. And it is ordered, that shall have the conduct of the sale of the real estate, and shall prepare the conditions and contracts of sale, and the abstract of title, subject to the approval of the registrar, and that in case any doubt or difficulty shall arise the papers shall, with the like approval, be submitted to , Esquire, to settle.

15. And it is further ordered, that, for the purpose of the inquiries hereinbefore directed, the registrar shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the registrar to give the most useful publicity to such inquiries.

16. And it is ordered, that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of and that the registrar do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

17. And lastly it is ordered, that this suit [*or* matter] stand adjourned for making a final decree to the day of .

[*Such part only of this Decretal Order is to be used as is applicable to the particular case.*]

21.

FORM OF ORDER UNDER ORDER VI., RULE 14, OR UNDER ORDER XII. Form of order under Order VI. r. 14, or under Order XII.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It appearing to me that it will be for the benefit of the estate that the remaining outstanding debts be sold, I do order that the debts now due to the estate of *E.F.* the testator [*or* intestate] in the plaint in this suit mentioned be sold as soon as conveniently may be by [the re-

ceiver] by private contract [*or* public auction] for the highest price that can be obtained for the same.

Dated this day of .

J.S., Judge.

22.

Form of order under Order VI., r. 14, or under Order XII.

FORM OF ORDER UNDER ORDER VI., RULE 14, OR UNDER ORDER XII.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It appearing to me that it is necessary for carrying out the objects of this suit that the real estate [*or* part of the real estate] of the deceased be sold, I do order that all that freehold [copyhold *or* leasehold] messuage or tenement, &c. [*setting out parcels as in last conveyance*] being the real [*or* part of the real] estate of *E.F.*, late of in the county of deceased, the testator [*or* intestate] in the plaint in the suit mentioned, be offered for sale by public auction at the Hotel at by Mr. auctioneer, and be then and there sold [provided the sum bid for the same be not less than £ *or*] to the highest bidder without reserve.

Dated this day of .

J.S., Judge.

23.

Decretal order for reference in foreclosure suit by legal mortgagee.

DECRETAL ORDER FOR REFERENCE IN FORECLOSURE SUIT BY LEGAL MORTGAGEE.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It is ordered that it be referred to the registrar to take an account of what is due to the plaintiff for principal and interest on the mortgage mentioned in the plaint (making allowance on one side or the other for any rents or profits received by the plaintiff, and for any sums of money lawfully expended by the plaintiff about the mortgaged premises), and to tax the plaintiff's costs of this suit, and that the registrar do certify to the Court on the day of what he shall find to be due for principal and interest as aforesaid, and for costs. And upon the defendant paying into Court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the registrar shall have presented his certificate; it is ordered that the plaintiff do reconvey the said mortgaged premises, free and clear from all incumbrances done by him, or any claiming by, from, or under him, and do deliver up to the registrar all deeds and writings in his custody or power relating thereto, and that upon such reconveyance being made, and deeds and writing

eing delivered up, the registrar shall pay out to the plain- Decretal order for reference in foreclosure suit by legal mortgagee.
ff the said sum so paid in as aforesaid, for principal, inte-
est, and costs; but in default of the defendant paying into
ourt such principal, interest, and costs as aforesaid by the
me aforesaid, then it is ordered that the defendant do
and absolutely debarred and foreclosed of and from all
quity of redemption of, in, and to the said premises, and
ie registrar is to settle the conveyance if the parties differ
bout the same; and it is further ordered, that after the
xpiration of the said six months, the plaintiff shall be at
berty to apply to the Court for a final decree for the fore-
losure of the said mortgage.

[*N.B.—Where the state of the account is ascertained at the rst hearing, instead of the order of reference to the registrar, gin,* It is declared that the sum of £ is now due to ie plaintiff for principal and interest on the mortgage aentioned in the plaint, and it is ordered that the registrar o tax the plaintiff's costs of this suit, and that]

24.

Decretal Order of Sale in a Suit by a Legal or Equitable Mortgagee or Person entitled to a Lien.

Decretal order of sale in a suit by a legal or equitable mortgagee or person entitled to a lien.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It is ordered that it be referred to the registrar to take an ccount of what is due to the plaintiff for principal and nterest on the mortgage [*or* equitable mortgage *or* lien] nentioned in the plaint, and to tax the plaintiff's costs of his suit, and that the registrar do certify to the Court on he day of what he shall find to be due for rincipal and interest as aforesaid, and for costs. And upon he defendant paying into Court what shall be certified to e due to the plaintiff for principal and interest as afore- aid, together with the said costs, within six months after he registrar shall have presented his certificate, it is or- ered that the plaintiff [do reconvey the said mortgaged pre- nises free and clear from all incumbrances done by him, or ny claiming by, from, or under him, and] do deliver up to he registrar all deeds and writings in his custody or power elating thereto, and that upon such reconveyance being nade, and deeds and writings being delivered up, the regis- rar shall pay out to the plaintiff the said sum so paid in as foresaid for principal, interest, and costs; but in default f the defendant paying into Court such principal, interest, nd costs as aforesaid by the time aforesaid, then it is or- ered that the said mortgaged premises [*or* the premises ubject to the said equitable mortgagee *or* lien] be sold vith the approbation of the registrar. And it is ordered hat the money to arise by such sale be paid into Court, to he end that the same may be duly applied in payment of

what shall be found due to the plaintiff for principal, interest, and costs as aforesaid, and that the balance (if any) shall be paid to the defendant.

25.

Decretal order.—Dissolution of partnership.

DECRETAL ORDER.—DISSOLUTION OF PARTNERSHIP.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the *London Gazette*, &c.

And it is ordered that be the receiver of the partnership estate and effects in this suit, and do get in all the outstanding book debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property, and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership.

3. An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A.) and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock in trade, be sold on the premises, and that the registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties are to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And lastly it is ordered that this suit stand adjourned for making a final decree to the day of .

26.

Final decree for foreclosure.

FINAL DECREE FOR FORECLOSURE.

In the County Court of , holden at .
In the suit of *A.B.* v. *C.D.*

Whereas it appears to the Court that the defendant has not paid into Court the sum which was on the day of last certified by the registrar to be due to the plaintiff for principal and interest upon the mortgage in

the plaint mentioned, and for costs, pursuant to the decretal order made in this suit on the day of last, and that the period of six months has elapsed since the said day of ; Final decree for foreclosure.

It is ordered that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of in and to the said mortgaged premises.

27.

PARTNERSHIP. artnership

Final Decree.

In the County Court of , holden at .
In the suit of *A.B.* v. *C.D.*

It is ordered that the fund now in Court, amounting to the sum of £ be applied as follows:

1. In payment of the debts due by the partnership set forth in the registrar's certificate, amounting in the whole to £ .

2. In payment of the costs of all parties in this suit, amounting to £ . [*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of £ to the plaintiff as his share of the partnership assets, and of the sum of £ , being the residue of the said sum of £ now in Court, to the defendant as his share of the partnership assets.

[*Or*, And that the remainder of the said sum of £ be paid to the said plaintiff [*or* defendant] in part payment of the sum of £ certified to be due to him in respect of the partnership accounts.

And that the defendant [*or* plaintiff] do, on or before the day of pay to the plaintiff [*or* defendant] the sum of £ being the balance of the said sum of £ due to him which will then remain due].

28.

NOTICE OF DECRETAL ORDER TO ABSENT PARTY. Notice of decretal order to absent party.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

Take notice that on the day of the decree of which a copy is hereunto annexed was made in this cause, and that from the service of this notice you will be bound by the proceedings in the above cause in the same manner as if you had been originally made a party to the suit, and that you may attend the proceedings under the said decretal order, and that you may apply to the Court to add to the decretal order.

Registrar.

To

29.

Notice to creditor to prove his claim.

NOTICE TO CREDITOR TO PROVE HIS CLAIM.

In the County Court of holden at .
In the suit *A.B.* v. *C.D.*

You are hereby required to prove the claim sent in by you against the estate of *A.B.* deceased, by filing such affidavit as you may be advised in support thereof, and by giving notice thereof to me, on or before the day of next, and by attending at my office on the day of 186 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of 186 .

Registrar.

To

30.

Notice to creditor of allowance of claim.

NOTICE TO CREDITOR OF ALLOWANCE OF CLAIM.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

The claim sent in by you against the estate of *A.B.* deceased, has been allowed at the sum of with interest thereon at per cent., per annum, from the day of 186 , and for costs.

[*If part only allowed, add,* If you claim to have a larger sum allowed, you are hereby required to prove such further claim, by filing such affidavit as you may be advised in support thereof, and by giving notice thereof to me on or before the day of next, and by attending at my office on the day of 186 , at o'clock in the noon.]

Dated this day of 186 .

Registrar.

39.

Registrar's certificate.

REGISTRAR'S CERTIFICATE.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

In obedience to the decretal order of this Court, made in the above suit, I hereby certify that the result of the accounts and inquiries [*or* of the sale and apportionment] which have been taken and made in pursuance of the made in this dated the day of 186 , is as follows.

The plaintiffs and defendants have attended by themselves or by their respective attornies.

Notice of Decretal Order.

Notice of the said decretal order of the day of 186 , has been served upon .

The persons so served include all the now living and the personal representatives of such of them as are

ead, except such as are parties to this suit, and except hereinafter named . Registrar's certificate.

Service of notice of the said decretal order upon the said was dispensed with.

Personal Estate Account.

The defendant the executor [*or* administrator] of the testator [*or* intestate] named in the said ave received personal estate to the amount of £ nd they have paid or are entitled to be allowed on account ereof sums to the amount of £ leaving a balance ue from [*or* to] them of £ on that account.

References to Account.

The particulars of the above receipts and payments ppear in the account marked A. verified by the affidavit f the said defendant filed the day of nd the account marked B. verified by the affidavit of filed the day of and which accounts are o be filed with this certificate.

Variations from Accounts.

Except that in addition to the sums appearing in such ccount to have been received, the said defendant [*or* laintiff] is [*or* are] charged with the following sums, that is to say,) £ , and except that of the items of isbursement in the said account I have disallowed those umbered and I have deducted from the item numered the sum of £ and from the item numered the sum of £ and in addition to the isbursements appearing in such account the said defendant ha paid and been allowed the sum of £

Special Allowances in Accounts.

The payments allowed to the said defendant [*or* plaintiff] n the said account include the sum of £ paid into ourt to the credit of this cause, on the day of 86 .

Reference to Transcript of Account.

The before mentioned account marked A. has been ltered, and the account marked A.B., and which is also to e filed with the certificate, is a transcript of the said ccount marked A. as altered and passed.

No Personal Estate received.

The defendant the executor [*or* administrator] f the testator [*or* intestate] named in the said have ot, nor hath any or either of them, or any person or ersons by their or any or either of their order, or for heir or any or either of their use, received any part of the ersonal estate of the said testator [*or* intestate].

Funeral Expenses.

The funeral expenses of the testator [*or* intestate], mounting to the sum of £ have been paid and are llowed the defendant [*or* plaintiff] the executor or administrator] of the said testator [*or* intestate [in the aid account of personal estate [hereinafter mentioned].

Registrar's certificate.

Debts.

The debts of the testator [*or* intestate, including the plaintiffs] which have been allowed are set forth in the Schedule hereto, and, with the interest thereon, and costs mentioned in the said Schedule, are due to the plaintiff and the other persons therein named, and amount altogether to . No other person has been allowed, or come in and proved, any debt against the estate of the said testator [*or* intestate], and the time fixed by advertisement for that purpose has expired.

Such of the said debts as are specialty are set forth in the first part of the said Schedule, and amount to £ ; such as are simple contract are set forth in the second part of said Schedule, and amount to £ .

Interest on Debts.

The interest on such debts is computed down to the date of this certificate, and after the rate of 4*l.* per centum per annum, from the day of 186 , the date of the said decretal order, unless otherwise specified in the said Schedule.

Legacies and Annuities.

The legacies given by the testator, other than annuities, are set forth in the first part of the Schedule hereto, and, with the interest therein mentioned, remain due to the persons therein named, and amount altogether to £ .

The annuities given by the testator, with the arrears due thereon, are set forth in the second part of the said Schedule. Such arrears amount to £ .

Interest on Legacies.

The interest on such legacies is computed down to the date of this certificate, and after the rate of 4*l.* per centum per annum, from the day of 186 , the end of one year after the testator's death, unless otherwise specified in the said Schedule.

The arrears of the annuities are computed to the date of this certificate, and from the testator's death, unless otherwise specified in the said Schedule.

Outstanding Estate.

The personal estate of the said testator [*or* intestate] [not specifically bequeathed outstanding er undisposed of consists of the particulars set forth in the Schedule hereto.

Real Estate.

The real estate which the said testator [*or* intestate] was seised of or entitled to consists of the particulars set forth in the Schedule hereto.

Incumbrances on Real Estate.

The incumbrances affecting the said testator's [*or* intestate's] real estate are specified in the Schedule hereto.

Rents and Profits Account.

The defendants [*or* plaintiff] the trustee named

Registrar's certificate.

in the said decretal order have received rents and profits of the testator's real estate to the amount of £ and they have paid or are entitled to be allowed on account thereof sums to the amount of £ leaving a balance due from [*or* to] them of £ on that account.

No Rents and Profits received.

The defendants [*or* plaintiff] the trustees named in the said decretal order have not, nor hath any or either of them or any person or persons by their or any or either of their order, or for their or any or either of their use, received any sum or sums of money on account of the rents and profits of the testator's [*or* intestate's] real estate.

Next of Kin.

The next of kin, according to the statutes for the distribution of the effects of intestates, of the intestate named in the said living at the time of his death were of whom the said have since died.

The legal personal representative of the said

The legal personal representative of the said

The legal personal representative of the said

Dated this day of

Registrar.

32.

Notice that registrar's certificate may be inspected.

NOTICE THAT REGISTRAR'S CERTIFICATE MAY BE INSPECTED.

In the County Court of , holden at
In the suit of *A.B.* v. *C.D.*

Take notice that the certificate of the result of the inquiries made and accounts taken by me under the decretal order of this Court made on the day of in this cause, lies in my office and can be inspected by you up to and inclusive of the day of [*here insert the day before the cause is to be further heard*].

Dated this day of .

Registrar.

To

33.

Bond to be given by receiver.

BOND TO BE GIVEN BY RECEIVER.

Know all men by these presents, that we, *A.B.* of, &c., and *C.D.* of, &c.. and *E.F.* of, &c., are jointly and severally held and firmly bound to *G.H.*, registrar of the County Court of holden at , in £ to be paid to the said *G.H.*, or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and

Bond to be given by receiver.

Whereas a plaint in equity has been filed in this Court by *A.B.* against *C.D.* for the purpose of [*here insert object of suit*];

And whereas the said *A.B.* has been appointed, by order of the above mentioned Court, to receive the rents and profits of the real [*or* freehold *or* copyhold *or* leasehold] estate [*or* estates] [and to get in the outstanding personal estate] of *C.D.*, the testator in the said plaint named;

Now the condition of this obligation is such, that if the above bounden *A.B.* do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estates, and in respect of the personal estate, of the said *C.D.* [*or as may be*] at such periods as the said Court shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void and of none effect, otherwise shall remain in full force and virtue.

A.B. (L.S.)
C.D. (L.S.)

Signed, sealed, and delivered by the above bounden in the presence of

NOTE.—*If deposit of money be made the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.*

34.

Warrant of execution on a decree or order of the Court for the payment of money.

WARRANT OF EXECUTION ON A DECREE OR ORDER OF THE COURT FOR THE PAYMENT OF MONEY.

In the County Court of , holden at .
In the suit of *A.B.* v. *C.D.*

Whereas on the day 186 this Court did, in the matter of this suit, decree [*or* order] that *A.B.* [*or C.D.*] should pay to *C.D.* [*or A.B.*] [*or* should pay into Court] the sum of : And whereas a copy of such decree [*or* order] was duly served upon *A.B.* [*or C.D.*] as the case may be: And whereas the said *A.B.* [*or C.D.*] has not paid the said sum of money according to the said decree [*or* order]: These are, therefore, to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the said *A.B.* [*or C.D.*], wheresoever they may be found within the district of this Court, (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds,) the sum stated at the foot of this warrant, being the amount directed to be paid by the said decree [*or* order], including the costs of this execution, and also to seize and take any money or bank

)tes (whether of the Bank of England or of any other ank), and any cheques, bills of exchange, promissory notes, onds, specialties, or securities for money, of *A.B.* [*or C.D.*] hich may there be found, or such part or so much thereof s may be sufficient to satisfy this execution, and the costs f making and executing the same, and to pay what you hall have so levied to the registrar of this Court, and ake return of what you have done under this warrant mediately upon the execution thereof,

Warrant of execution on a decree or order of the Court for the payment of money.

Given under the seal of the Court, this day of 186 .

By the Court,

Registrar.

To the High Bailiff of the said Court, and others the Bailiffs thereof.

Amount ordered to be paid	-
Costs - - - - - -	-
Total amount to be levied	-

35.

WARRANT OF ASSISTANCE.

Warrant of assistance.

In the County Court of . holden at .
In the suit of *A.B.* v. *C.D.*

Whereas, according to the tenor and true meaning of a decree [*or* an order] bearing date the day of 186 , made in the matter of this suit, the said defendant *C.D.* was ordered to deliver up possession to *A.B.* in the said order named of all that, *&c.* [*as in order*]: And whereas a copy of such decree [*or* order] was duly served upon the said *C.D.*, yet nevertheless he the said *C.D.*, and other ill-disposed persons, his accomplices, have refused to pay obedience thereto, and detain and keep the possession of the said house [*or* tenement and premises]: These are, therefore to authorize and require you to forthwith enter into and upon the said messuage [*or* tenement and premises], and that you do remove, eject, and expel the said *C.D.*, his tenants, servants, and accomplices, each and every of them, out of and from the said messuage [*or* tenement and premises], and every part and parcel thereof, and that you do place and put the said *A.B.* and his assigns into the full, peaceable and quiet possession thereof, and defend and keep him and his said assigns in such peaceable and quiet possession when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said order; and herein you are not in anywise to fail.

Warrant of assistance.

Given under the seal of the Court, this day of 186 .

By the Court.

Registrar.

To the High Bailiff of the said Court, and others the Bailiffs thereof.

36.

Warrant of possession.

WARRANT OF POSSESSION.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

Whereas on the day of 186 , this Court did in the matter of this suit decree [*or* order] that you, the high bailiff of this Court, should [*or* that *A.B.* should] take possession of the goods and chattels of *E.F.*, deceased, in the said suit mentioned, and which at the date of the said order were in the possession of the defendant [and sell and convert the same into money or keep and hold the same to abide the further order of the Court, as the case may be].

These are therefore by virtue of the said decree [*or* order] and the statute in such case made and provided to will and require, authorize and empower, you and every one of you to whom this warrant is directed forthwith to enter into and upon the house and houses of the said *C.D.*, and also in all other place or places belonging to the said *C.D.* where any of the goods or chattels, part of the estate of the said *E.F.*, deceased, are suspected to be; and there to seize all the goods and chattels whatsoever belonging to the estate of the said *E.F.*, deceased.

And in case of resistance, or of not having the key or keys of any door or lock of any premises belonging to the said *C.D.*, where any of the goods or chattels, part of the estate of the said *E.F.*, are suspected to be, you shall break open, or cause the same to be broken open, for the better execution of this warrant.

Given under the seal of the Court this day of 186 .

By the Court.

Registrar.

To the High Bailiff of the said Court, and others the bailiffs thereof.

37.

Notice of change of attorney.

NOTICE OF CHANGE OF ATTORNEY.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

To the Registrar of the Court.

Take notice that I, *A.B.* [*or C.D.*] have hitherto em-

bloyed as my attorney *G.H.*, of in the above mentioned cause, but that I have ceased to employ him, and that my present attorney is *I.K.*, of . Notice of change of attorney.

A.B. [*or C.D.*]

38.

ORDER OF REVIVOR.

Order of revivor.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.*

Upon application of [*here state by whom the application is made and the events which have happened rendering it necessary to apply*], I do order that this suit stand revived and be in the same plight and condition as the same was in at the time of the said abatement.

Dated this day of .

J.S., Judge.

39.

ORDER OF PAYMENT OF LEGACY INTO COURT OF CHANCERY.

Order of payment of legacy into Court of Chancery.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.* *Or*, In the matter of .

Whereas it has been found by this Court by its decree of the day of in this suit [*or* matter] that *K.L.*, of is entitled to the sum of £ and whereas the said *K.L.* is an infant [*or* absent beyond seas], and it appearing to the Court that it is desirable that, under the power given to it by the fifth section of the Act of Parliament passed in the twenty-eighth and twenty-ninth years of her Majesty's reign, chapter ninety-nine, *C.D.*, the defendant in this suit [*or matter, or as the case may be*], should be ordered to pay such sum of money to the Accountant General of the Court of Chancery, in accordance with the provisions of section thirty-two of an Act passed in the session of Parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two, it is ordered that the said [ ] to pay the same accordingly, and do within days produce to the registrar of this Court the certificate of the said Accountant General of the payment to him of such money.

By the Court.

Registrar.

[ENDORSEMENT ON LAST ORDER.]

N.B.—Your attention is drawn to the following provisions of the Act 36 *Geo.* 3, *c.* 52, *and to the Rule of this Court.*

Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found or declared entitled by any County Court in any suit or matter under

Order of payment of legacy into Court of Chancery.

this Act may be ordered by the Court to be paid to the Accountant General of the Court of Chancery, in accordance with the provisions of section thirty-two of an Act passed in the session of Parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two; and the person ordered to pay the same shall, within such time as the Court shall direct, produce to the registrar of the Court the certificate of the Accountant General of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to issue to the high bailiff of the Court, who by such warrant shall be empowered to levy, or cause to be levied, by distress and sale of the goods and chattels of such person, a sum of money equal in amount to the sum which he was ordered to pay to the said Accountant General, and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said Accountant General under the direction of the Court.

Rule of Court.—Where default shall be made in the production of the certificate of the Accountant General, the registrar shall give notice in writing to the judge of the fact of such default, and the judge may thereupon direct a warrant of execution to issue in accordance with section 5 of the Act.

40.

Order of transfer of suit or matter to Court of Chancery.

ORDER OF TRANSFER OF SUIT OR MATTER TO COURT OF CHANCERY.

In the County Court of holden at .
In the suit of *A.B.* v. *C.D.* [*or* matter of] .

Whereas it appearing that the subject-matter of this suit exceeds in amount the sum of 500*l.*, it is ordered that this suit [*or* matter] be transferred to the High Court of Chancery, together with the annexed certificate of the registrar of this Court, showing the state of the suit [*or* matter] and the proceedings that have been had therein in this Court.

By the Court.

Registrar.

41.

GENERAL HEADING FOR AND ENDORSEMENT ON DECRETAL ORDER OR DECREE.

In the County Court of holden at on the day of .

General heading for decretal order or decree.

Upon the hearing this day of Mr. for the plaintiffs, and upon the hearing of Mr. for the defendants [*or if some of the defendants do not appear*, for the defendants *C.D.*, &c., and no one appearing for the defendants *E.* and *F.*], it is ordered

ENDORSEMENT.

Endorsement on decretal order or decree.

Take notice that unless you obey the directions contained this order, obedience thereto will be enforced in such anner as the law provides.

42.

ITEM. TO BE PLACED AT FOOT OF EVERY SUMMONS, NOTICE, DECREE, OR ORDER OF COURT, OR ANY OTHER PROCESS OF THE COURT.

Mem. to be placed at foot of every summons, notice, decree or order of Court, or any other process of the Court.

Hours of attendance at the office of the registrar [*place office*] from ten till four, except on [*here insert the day on hich the office will be closed*], when the office will be closed t one.

43.

ALLOWANCE TO WITNESSES.

Allowance to witnesses.

	£.	s.	d.		£.	s.	d.
Gentlemen, merchants, bankers, and professional men, per diem from	0	10	0	to	1	0	0
Tradesmen, auctioneers, accountants, clerks, and yeomen, per diem from	0	5	0	to	0	10	0
Artizans and journeymen, per diem from	0	3	0	to	0	5	0
Labourers and the like, per diem from	0	2	0	to	0	3	0

Travelling expenses, sum reasonably paid, but no more han sixpence per mile one way.

A.—SUITS AND PROCEEDINGS IN EQUITY BOOK.

A.—Suits and proceedings in equity book.

No. of Plaint or Petition_____

Date of Filing_____

PARTIES NAMES.

Plaintiffs.	Defendants.

A.—Suits and proceedings in equity book.

PARTIES NAMES.—*continued.*

Name and Address of Plaintiff's Attorney.	Name and Address of Defendant's Attorney.

NATURE OF SUIT OR PROCEEDING.

PROCEEDINGS.

By Plaintiff.			By Defendant.		
Letter on filing.		Date.	Letter on filing.		Date.
	Here enter applications for substituted[*or* other] service of summons, subpœnas, injunctions, &c., or documents filed.			Here enter applications for subpœnas, and filing of admissions, statements, &c.	

DECRETAL ORDER MADE ON RETURN DAY OF SUMMONS OR ADJOURNMENT.

Here set forth the nature of the Decretal Order.	Date of Hearing.	Date of Adjournment.

A.—Suits and proceedings in equity book.

PROCEEDINGS.

By Plaintiff.			By Defendant.		
Letter on filing.		Date.	Letter on filing.		Date.
	Here enter all ex parte applications, or otherwise, and whether made by Plaintiff or Registrar, documents filed, warrants issued, &c.			Here enter all documents filed, &c.	

Letter on filing.	CERTIFICATE.	Date.
	Date on which it was directed to be prepared for Court - - - Application to vary by - - - Application refused [*or* granted] - Date on which it was filed as confirmed [*or* as varied] - - -	

Letter on filing.	FINAL DECREE.	Date of making.
	Here set forth shortly the particulars of the decree, such as the acts to be done, or sums to be paid, &c.	

Letter on filing.	APPEAL.	Date.
	Here enter proceedings had.	

Letter on filing.	COSTS TAXED.	£. s. d.	Date.
	Plaintiffs' Bill; Defendants' Bill; state out of what fund to be paid, &c.		

B.—CASH BOOK.

Receipts.					Payments.			
Date.	No. of Plaint or Petition.	Suit or Matter.	Ledger Folio.	Amount.	Date.	No. of Plaint or Petition.	Ledger Folio.	Amount.
		A.B. *v.* C.D.						

C.—Ledger.

In the suit of *A.B.* v. *C.D.*
In the matter of

Plaint No. of
Petition No. of

Folio in Cash Book.	Date when received.	Names of Persons from whom received.	On what account and from what source received.	Amount received.	Folio in Cash Book.	Date when paid or allowed.	Names of Persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed.

A SCALE OF COSTS AND CHARGES

TO BE PAID TO COUNSEL AND ATTORNEYS IN THE COUNTY COURTS, UNDER THE PROVISIONS OF THE STATUTE 28TH AND 29TH VICTORIA, CHAPTER 99.

	Lower Scale not exceeding £100.			Higher Scale above £100.		
	£.	s.	d.	£.	s.	d.
Instructions to sue or defend	0	10	0	0	15	0
Examining, and taking minutes of evidence of each witness, afterwards allowed by the judge	0	3	0	0	5	0
Application for substituted service or service out of England	0	4	0	0	6	0
Service sum allowed by judge						
Drawing plaint or petition or statement by defendant, or preparing instructions for counsel to draw the same, and attendance therewith	0	13	4	1	0	0
Fee to counsel and clerk therewith	1	3	6	2	4	6
Attendance, and filing plaint, petition, admission, or statement	0	3	4	0	6	8
Every copy of plaint, petition, admission, or statement	0	2	0	0	3	0
Preparing, and service of notice to inspect, admit, or produce and fair copy	0	4	0	0	6	0
Attending inspecting documents	0	5	0	0	7	0
Mileage one way from the attorney's place of business to place of inspection, for each mile	0	0	6	0	0	6
Preparing admission by defendant	0	3	0	0	5	0
All necessary affidavits not exceeding five folios, including filing, each	0	5	0	0	7	0
If above five folios are allowed upon taxation, then for every additional folio	0	1	0	0	1	0
Attending Court, and conducting cause where no counsel employed	1	10	0	2	2	0
Instructions for, and drawing and copy briefs, in causes or matters in which the counsel is employed, including attendance on counsel therewith	2	0	0	3	0	0
Fee to counsel and clerk, not exceeding	2	4	6	3	5	6
Attending Court on hearing with counsel	0	10	0	0	15	0
Attending Court to support or oppose any application or motion without counsel	0	15	0	1	0	0
Attending in last mentioned cases with counsel	0	10	0	0	15	0
Fee to counsel and clerk not exceeding	1	3	6	2	4	6
Every attendance on the registrar which he may think upon taxation was necessary	0	5	0	0	7	0

	Lower Scale not exceeding £100. £. s. d.	Higher Scale above £100. £. s. d.
When the attendance is longer than one hour, then for every additional hour or part of an hour	0 4 0	0 6 0
The like costs for attendance before an examiner.		
Witnesses' expenses in conformity with rule.		

Occasional Costs.

Where in the course of a cause or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the judge to allow such sums as he may think fit out of any funds in Court applicable to that purpose.		
For attorney's journey to attend hearing, mileage one way from attorney's place of business to Court, for each mile . .	0 0 6	0 0 6
Where in opinion of registrar he could not return same night	1 1 0	1 11 6
Drawing accounts and other documents not included in the foregoing costs, but allowed upon taxation of costs to be necessary, per folio	0 0 8	0 0 8
For perusing and adapting old abstracts of title, per three sheets	0 3 4	0 3 4
Drawing abstracts of additional deeds and documents, per sheet	0 6 8	0 6 8
For preparing conditions and contracts of sale, and fair copy, per folio	0 0 8	0 0 8
Where condition and contract are not submitted to counsel, in addition to the above there shall be allowed for perusing abstracts, every three sheets	0 3 4	0 3 4
Where conditions and contracts are to be settled by counsel, instructions to counsel to accompany abstract, and attendance therewith, or letter	0 6 8	0 13 4
Fee to counsel		
Fair copies of abstracts of title or of accounts, documents, opinion of counsel, and of papers received from counsel, per folio . .	0 0 4	0 0 4
Attending sale	1 1 0	2 2 0
Where by any proceeding taken by the opposite party it becomes necessary to advise or receive instruction from a client in the progress of a suit or matter, for each attendance	0 6 8	0 13 4

	Lower Scale not exceeding £100.			Higher Scale above £100.		
	£.	s.	d.	£.	s.	d.
Attending taxing costs	0	5	0	0	7	0
Letters and messages	0	5	0	0	10	0
Costs of the Day on Adjournment.						
Attending Court where no counsel employed .	0	15	0	1	0	0
Attending with counsel	0	10	0	0	15	0
Refresher fee to counsel and clerk not exceeding	1	3	6	2	4	6
Witnesses' expenses same as on trial.						
Costs on Appeal.						
Preparing notice of appeal, including copies and service	0	7	0	0	10	0
Preparing case, including copies	0	10	0	0	15	0
Attending judge to sign	0	5	0	0	7	0
Attending judge in case of difference to settle	0	10	0	0	15	0
Application to stay proceedings . . .	0	7	0	0	10	0
Transmitting case and copies, including notice to successful party	0	5	0	0	7	0
Application to judge for leave to proceed on judgment	0	5	0	0	7	0
Depositing decree or order of Court of Appeal	0	3	0	0	4	0

N.B.—*The registrar is to tax the bills of costs upon the lower Scale when the subject-matter of the suit or proceeding does not exceed* 100*l.*, *and upon the higher when it exceeds* 100*l.*

We, John Bury Dasent, John Worlledge, Rupert Alfred Kettle, and William Furner, being County Court Judges appointed to frame Rules and Orders for regulating the practice of the Courts, and forms of proceeding therein, under the 32nd section of the 9 and 20 Vict. cap. 108, have, under the powers vested in us by the Act 28 and 29 Vict. cap. 99, framed the above scale of costs and charges to be paid to counsel and attorneys in suits and proceedings in Equity: and we do hereby certify the same to the Lord Chancellor accordingly.

J. B. Dasent.
J. Worlledge.
Rupert A. Kettle.
William Furner.

I approve of this scale, to come into operation in all County Courts on the 1st day of October, 1865.

CRANWORTH, C.

Fees of Registrars and High Bailiffs of the County Courts.

Whereas by an Act passed in the session of Parliament holden in the twenty-eighth and twenty-ninth years of the reign of her present Majesty, chapter ninety-nine, it is enacted that the registrars and high bailiffs of the County Courts shall be remunerated for the duties to be performed by them under the jurisdiction in equity given to the Courts by this Act, by receiving for their own use such fees as may be from time to time authorized to be taken by any orders to be made by the Commissioners of the Treasury, with the consent of the Lord Chancellor; and the Commissioners of the Treasury are hereby authorized and empowered, with such consent as aforesaid, from time to time to make such orders.

In pursuance of the power given by the above recited Act, we, the undersigned, two of the Commissioners of her Majesty's Treasury, whose names are hereunto subscribed, do hereby, with the consent of the Lord Chancellor, order that on and after the 1st day of October, 1865, the several fees or sums in the name of fees specified in the Schedule hereunder written, shall be taken on the proceedings therein mentioned; and that the fees so authorized to be taken shall be received by the registrars and high bailiffs of the different County Courts for their own use, as provided by the above recited Act.

Luke White.

E. H. Knatchbull Hugessen.

I approve of the annexed Schedule of Fees.

CRANWORTH, C.

Schedule.

REGISTRARS' FEES.	Where the subject-matter of the suit or proceeding does not exceed £100. £.	s.	d.	Where the subject-matter of the suit or proceeding exceeds £100. £.	s.	d.
For filing every plaint or petition, and issuing summons or notice thereon	0	6	0	0	9	0
If more than one defendant, then for every additional defendant	0	2	0	0	2	0
If defendant out of England, then in addition (including filing affidavit)	0	5	0	0	7	0
For filing and sealing every affidavit or other document	0	1	0	0	1	0
For every application to inspect an affidavit	0	1	0	0	2	0
For every summons to a witness	0	3	6	0	5	0
For attesting admission of defendant and filing	0	3	6	0	5	0
For filing statement of defendant, or notice by plaintiff for dismissal of cause	0	2	6	0	4	0
For drawing, filing, and sealing every decretal order, final decree, or an order on a petition, or application for an order in the nature of an injunction (including issuing the copy of same for service)	0	15	0	1	5	0

REGISTRARS' FEES.	Where the subject-matter of the suit or proceeding does not exceed £100. £. s. d.	Where the subject-matter of the suit or proceeding exceeds £100. £. s. d.
If more than one copy of decree, &c., to be issued, then for every additional copy	0 2 0	0 2 0
For drawing advertisements and inserting	0 5 0	0 7 0
For advertisements, sum paid.		
For every sitting in which the registrar is employed in taking accounts, making inquiries, or acting as a special examiner	0 7 0	0 10 0
When the sitting is longer than one hour, then for every additional hour or part of an hour	0 5 0	0 7 0
Where the registrar shall be required to attend elsewhere than at the Court or office, in addition to the above	0 10 0	1 0 0
Mileage one way from the office to place of examination, for each mile	0 0 6	0 0 6
For application to judge for further directions (including drawing order)	0 7 0	0 12 0
For drawing draft order for an *ex parte* application, and the order as afterwards made	0 10 0	0 15 0
For certificate directed to be made by any decretal order	0 15 0	1 10 0
For every inspection of certificate at registrar's office	0 1 0	0 2 0
For giving any notice required by any of "The Orders" (including copying)	0 2 0	0 2 6
For office copy of every document, per folio	0 0 4	0 0 4
For making and transmitting note of any decretal order or final decree, or of an order made on petition under Order XXIII., rule 24	0 2 6	0 3 6
For auditing receiver's accounts where sum in account does not exceed 100*l.*	0 5 0	0 5 0
And for every additional 50*l.* or fraction thereof	0 2 6	0 2 6
For every application for a search and searching	0 2 0	0 2 0
For taxation of costs	0 5 0	0 7 0
For payment out of Court and taking receipt for dividends on stock exceeding 1*l.* and not exceeding 5*l.*	0 2 0	0 2 0
Exceeding 5*l.*	0 3 0	0 3 0
For procuring investments in consols 5*s.* per cent. on the amount invested, exclusive of bankers' and brokers' commission		
For drawing orders under Order XVII., rule 6	0 4 0	0 4 0

HIGH BAILIFF'S FEES.	Where the subject-matter of the suit or proceeding does not exceed £100. £.	s.	d.	Where the subject-matter of the suit or proceeding exceeds £100. £.	s.	d.
For calling the cause	0	2	0	0	3	0
For service of every summons, petition, notice, or order, not being summonses to jurors						
If within one mile of Court house	0	2	6	0	5	0
If beyond one mile, then for every additional mile or part of a mile	0	0	6	0	0	6
Where service is ordered to be personal, then an additional fee of	0	3	6	0	5	0
For affidavit of service when required	0	2	0	0	4	0
For the execution of each warrant	0	5	0	0	10	0
With an allowance of mileage, double the amount of allowance on summonses.						
Keeping possession, for each day the man is actually in possession	0	4	6	0	4	6
3s. 6d. of the above sum is to be paid to the man in possession, and his receipt produced to the registrar.						
Superintending sale, whether by auction or private contract, making out account and paying money into Court, 2*l.* per cent. on first 50*l.* so paid, and 1*l.* per cent. on all afterwards.						

N.B.—Where the amount or value of the subject-matter of the suit or proceeding is not disclosed in the plaint or petition, it shall be taken not to exceed 100*l.*, and the fees charged accordingly. If, however, the judge shall subsequently certify that the amount or value of the subject-matter does exceed 100*l.*, the difference between the fees up to that time taken and those that would have been taken had it exceeded 100*l.* may then be taken.

ORDER AS TO TRANSFERS TO THE COURT OF CHANCERY.

"I, the Right Honourable ROBERT MONSEY BARON CRANWORTH, Lord High Chancellor of Great Britain, do hereby, in pursuance and execution of the powers given by the statute 28th and 29th of Victoria, cap. 99, order that any suit or matter transferred from any County Court to the Court of Chancery, under the provisions of section 9 of the said statute, shall proceed in the Court of the Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY.

"Dated this 23rd day of December, 1865.

"CRANWORTH, C."

Under section 18, V. C. Kindersley will also be the appeal judge.

APPENDIX.

PART II.

STATUTES.

Statutes relating to the Practice and Jurisdiction Generally.

13 & 14 *Vict. c.* 35.

13 & 14 *Vict. c.* 35, *s.* 28.

An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England. [15th July, 1850.]

Power for the Court notwithstanding any rule, &c., to the contrary to receive proof by affidavit.

XXVIII. And be it enacted, that notwithstanding any rule or practice of the said Court to the contrary, it shall be lawful for the said Court, at the hearing of any cause or of any further directions therein, to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause, as in the opinion of the said Court may safely and properly be so proved.

15 & 16 *Vict. c.* 80.

15 & 16 *Vict. c.* 80.

An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make Provision for the more speedy and efficient Despatch of Business in the said Court. [30th June, 1852.]

Whereas proceedings before the Masters in Ordinary of the High Court of Chancery are attended with great delay and expense, and it is expedient that the business now disposed of in the office of such Masters should be transacted by and under the more immediate direction and control of

15 & 16 *Vict. c.* 80.

the judges of the said Court: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power to Master of the Rolls and Vice Chancellors to sit at chambers for the despatch of business, &c.

XI. From and after the first day of Michaelmas Term, 1852, it shall be lawful for the Master of the Rolls and the Vice Chancellors for the time being, and they are hereby required to sit at Chambers for the despatch of such part of the business of the said Court as can, without detriment to the public advantage arising from the discussion of questions in open Court, be heard in Chambers, according to the directions hereinafter in that behalf specified or referred to; and the times at and during which they respectively shall so sit shall be from time to time fixed by them respectively.

Judges to have same power and jurisdiction as in open Court.

XIII. The Master of the Rolls and every of the Vice Chancellors respectively when sitting in Chambers shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open Court.

Orders made in chambers to be ordinarily drawn up by judges' clerks, but judges may direct them to be drawn up by registrars of the Court, and may require their attendance at chambers for the purpose.

XIV. The orders made by the Master of the Rolls and Vice Chancellors respectively when sitting in Chambers shall ordinarily be drawn up there by their respective clerks, to be appointed as hereinafter mentioned, but with power to each of such judges to direct any of such orders to be drawn up by the registrar of the said Court in like manner as orders made by a judge of the said Court in open Court are drawn up, for which purpose the registrars of the said Court shall, when required, attend the Master of the Rolls and the Vice Chancellors respectively when sitting at Chambers in such order and manner as shall be found most convenient for furthering the business of the said Court, and as the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice Chancellors, or any two of them, shall from time to time by any general order direct.

Orders made at chambers to have same force as Orders of Court, &c.

XV. All orders of the Master of the Rolls, or of any Vice Chancellor, made by him at Chambers, shall have the force and effect of orders of the Court of Chancery, and such orders may be signed and enrolled in like manner.

Business to be disposed of in chambers by the judges.

XXVI. The business to be disposed of by the Master of the Rolls and Vice Chancellors respectively while sitting at Chambers shall consist of such of the following matters as the judge shall from time to time think may be more conveniently disposed of in Chambers than in open Court, viz., applications for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication; and also applications for the production of documents; applications relating to the conduct of suits or matters; applications as to the guardianship and maintenance of infants matters connected with the management of property; and

such other matters as each such judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor. 15 & 16 *Vict. c.* 80, *s.* 26.

Judges may adjourn from open Court to chambers, and *vice versâ*, the consideration of any matter.

XXVII. It shall be lawful for the Master of the Rolls, and every of the Vice Chancellors respectively, when sitting in open Court, to adjourn for consideration in Chambers any matter which, in the opinion of such judge, may be more conveniently disposed of in Chambers, or, when sitting in Chambers, to direct any matter to be heard in open Court which he may think ought to be so heard.

Mode of proceeding before judges at chambers to be by summons as at common law.

XXVIII. The mode of proceeding before the Master of the Rolls and Vice Chancellors respectively at Chambers shall be by summons, and as near as may be according to the form now adopted by the judges of the Superior Courts of common law when sitting at Chambers.

Power to the judges to direct what matters, &c., shall be heard and investigated by themselves, and what by their chief clerks.

XXIX. From and after the first day of Michaelmas Term, 1852, the Master of the Rolls and the Vice Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor with the advice and assistance of them, or any two of them,) to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly, if the judge shall so direct, his chief clerks respectively shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present Masters; and the judge shall give such aid and directions in every or any such account or inquiry as he may think proper, but subject nevertheless to the right hereinafter provided for the suitor to bring any particular point before the judge himself.

Right to suitor to bring any point before the judge.

Power to chief clerks to issue advertisements and summonses, to administer oaths, &c., as the judge shall direct.

XXX. Each chief clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments, other than acknowledgments by married women, to receive affirmations, and, when so directed by the judge to whose Court he is attached, to examine parties and witnesses either upon interrogatories or *vivâ voce*, as such judge shall direct.

Parties, &c., not attending liable to process of contempt and to penalties for false swearing, &c.

XXXI. Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court, or in case of default in attendance, in pursuance of any order of the said Court, or of any writ of *subpœna ad testificandum*; and all persons swearing or affirming before any such chief clerk shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein as if the matters sworn or

15 & 16 *Vict. c.* 80, *s.* 31.

affirmed had been sworn and affirmed before any person now by law authorized to administer oaths, to take affidavits, and to receive affirmations.

Result of proceedings before chief clerk to be embodied in form of short certificate, &c.

XXXII. The directions to be given by the Master of the Rolls or any Vice Chancellor for or touching any proceedings before his chief clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the judge, and shall not be embodied in a formal report, unless in any case the judge shall see fit so to direct; and when the judge shall approve of such certificate or report he shall sign the same in testimony of his adopting the same.

No exceptions to lie to certificate, &c. Parties at liberty to take opinion of judge upon any particular point.

XXXIII. No exceptions shall lie to any certificate or report of the chief clerk, although signed and adopted by the judge; but any party shall, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded, and before the certificate or report shall have been signed and adopted, as the Lord Chancellor shall by any general order direct, be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding when it is brought by the chief clerk to a conclusion.

Certificate, &c., signed and adopted by judge, binding on all parties unless discharged or varied.

XXXIV. When any certificate or report of the chief clerk shall have been signed and adopted by the judge, the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at Chambers or in open Court, according to the nature of the case, upon application by summons or motion within such time as shall be prescribed in that behalf by any general order of the Lord Chancellor; and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same, or the like grounds as any report of a Master of the said Court which has been absolutely confirmed may now be opened.

Power to obtain the assistance of accountants, merchants, &c.

XLII. It shall be lawful for the said Court, or any judge thereof, in such way as they may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable such Court or judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons.

Taxing master to regulate fees to conveyancing counsel, &c., subject to appeal.

XLIII. The allowances in respect of fees to such conveyancing counsel, accountants, merchants, engineers, actuaries, and other scientific persons, shall be regulated by the taxing master of the said Court, subject to an appeal to the judge to whose Court the cause or matter shall be attached, whose decision shall be final.

15 & 16 *Vict. c.* 86.

15 & 16 *Vict. c.* 86. *An Act to amend the Practice and Course of Proceeding in the High Court of Chancery.*

[1st July, 1852.]

Whereas it is expedient to amend the practice and course

of proceeding in the High Court of Chancery; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: 15 & 16 *Vict. c.* 86.

X. Every bill of complaint to be filed in the said Court after the time hereinafter appointed for the commencement of this Act, shall contain as concisely as may be a narrative of the material facts, matters, and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief: but such bill of complaint shall not contain any interrogatories for the examination of the defendant. Bills of complaint to contain concise narratives of material facts, &c., divided into numbered paragraphs but not to contain interrogatories.

XI. Before the name of any person shall be used in any suit to be instituted in the said Court as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, information, or claim. Person whose name is used as next friend of any infant, &c., in any suit, &c., to sign a written authority.

XVIII. It shall be lawful for the Court, upon the application of the plaintiff in any suit in the said Court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just. Court or judge may order defendant to produce documents, &c., on oath.

XX. It shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the Court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just. Upon application, of defendant after answer, plaintiff may be required to produce documents on oath.

XXII. All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery, and also acknowledgments required for the purpose of enrolling any deed in the said Court, shall and Pleas, declarations, &c., in Chancery, how to be sworn and taken in

15 & 16 *Vict. c.* 86, *s.* 22.

Scotland, Ireland, the Channel Islands, &c.

may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, Court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such Court, judge, notary public, person, consul, or vice consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said Court.

Penalty for falsely swearing, &c.

XXIII. All persons swearing, declaring, affirming, or attesting before any person authorized by this Act to administer oaths and take declarations, affirmations, or attestations of honour, shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein as if the matter sworn, declared, affirmed, or attested had been sworn, declared, affirmed, or attested before any Court or persons now by law authorized to administer oaths, and take declarations, affirmations, or attestations upon honour.

Penalty for forging signature or seal of judge, &c., empowered to administer oaths under this Act.

XXIV. If any person shall forge the signature or the official seal of any such judge, notary public, or other person lawfully authorized to administer oaths under this Act, or shall tender in evidence any plea, answer, disclaimer, examination, affidavit, or other judicial or official document with a false or counterfeit signature or seal of any such judge, Court, notary public, or other person authorized as aforesaid attached or appended thereto, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under an Act passed in the eighth and ninth years of the reign of Her present Majesty, intituled An Act to facilitate the Admission in evidence of certain official and other documents.

Answers, &c. to be filed without oath of messenger

XXV. Pleas, answers, disclaimers, or examinations, whether taken by commission out of the jurisdiction of the said Court or otherwise, may be filed without the oath of a messenger, and any alterations made therein previously to the taking thereof shall be authenticated according to the practice now in use with respect to affidavits.

Witnesses to be examined by one of the examiners of the Court, in the presence of the parties.

XXVI. All witnesses to be examined orally under the provisions of this Act shall be so examined by or before one of the examiners of the Court, or by or before an examiner to be specially appointed by the Court, the examiner being furnished by the plaintiff with a copy of the bill, and of the answer, if any, in the cause; and such

examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination, shall be conducted as nearly as may be in the mode now in use in Courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause. 15 & 16 *Vict. c.* 86, *s.* 31.

XXXII. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the Court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the Court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just. Depositions to be taken down in writing, and read over to the witness, who shall sign the same in presence of the parties, but if he refuse to sign, examiner may, and state any special matter he may think fit.

XXXIII. If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said Court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said Court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court. If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted. Proviso as to witness demurring to questions.

XXXIV. When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the record office of the said Court, to be there filed, and any party to the suit may have Original depositions to be transmitted to the record office, and filed.

15 & 16 *Vict. c.* 86, *s.* 34.

a copy thereof or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any general order of the Lord Chancellor in that behalf.

Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths.

XXXV. It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said Court; and any examiner appointed by any order of the Court shall have the like power of administering oaths as commissioners now have under commissions issued by the Court for the examination of witnesses.

Affidavits to be divided into paragraphs numbered.

XXXVII. Every affidavit to be used in the said Court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject.

Evidence subsequent to hearing to be taken the same as prior to hearing.

XLI. In cases where it shall be necessary for any party to any cause depending in the said Court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing.

Defendant not to take objection for want of parties in any case to which rules herein set forth shall extend.

XLII. It shall not be competent to any defendant in any suit in the said Court to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said Court, and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled.

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Rule 4. Any one of several cestuisque trust under any deed or instrument may, without serving any other of such cestuisque trust, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or cestuique trust for the administration of the estate, or the execution of the trusts.

Rule 7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question. 15 & 16 *Vict. c.* 86, *s.* 42.

Rule 8. In all the above cases the persons who, according to the present practice of the Court would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the Court to add to the decree.

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.

Court may proceed in any suit, &c., without representative of deceased person, or may appoint one.

XLIV. If in any suit or other proceeding before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit either specially or generally by public advertisements; and the order so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court.

Court may direct sale of

XLVIII. It shall be lawful for the Court in any suit for

15 & 16 *Vict. c.* 86, *s.* 48.

mortgaged property instead of a foreclosure on such terms as it may think fit.

the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request.

Suit not to be dismissed for misjoinder of plaintiffs, but Court may modify its decree, according to special circumstances.

XLIX. No suit in the said Court shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but wherever it shall appear to the Court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court shall have power to grant such relief, and to modify its decree, according to the special circumstances of the case, and for that purpose to direct such amendments if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient.

No suit to be objected to because only declaratory order sought.

L. No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.

Court may decide between some of the parties without making others interested parties to the suit.

LI. It shall be lawful for the Court to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instru-

ent, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument to be executed under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: Provided always, that if the Court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed. 15 & 16 *Vict. c.* 86, *s.* 51. Proviso.

LII. Upon any suit in the said Court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties who according to the present practice of the said Court would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerks of records and writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor, to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: Provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians ad litem shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor in that behalf. In case of abatement, &c., of suit, an order may be made, which shall have same effect as a bill of revivor.

15 & 16 *Vict. c.* 86, *s.* 53.

LIII. It shall not be necessary to exhibit any supplemental bill in the said Court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same as shall in that behalf be prescribed by any general order of the Lord Chancellor.

New facts, &c., after commencement of suit, to be introduced as amendments to bill, &c.

LIV. It shall be lawful for the Court, in any case where any account is required to be taken, to give such special directions, if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

Where account required to be taken, Court may give special directions as to the mode of taking same.

LV. If after a suit shall have been instituted in the said Court in relation to any real estate it shall appear to the Court that it will be necessary or expedient that the said real estate, or any part thereof, should be sold for the purposes of such suit, it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid, to all intents and purposes, as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct.

Court may order real estate to be sold, if required.

LVI. Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the Court, be laid before some conveyancing counsel to be approved by the Court, for the opinion of such counsel thereon, to the intent that the said Court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof; and

Before sale of estate abstract of title to be laid before some conveyancing counsel.

Time for delivery of abstract to be specified in conditions of sale.

hen an estate or interest shall be so put up for sale, a me for the delivery of the abstract of title thereto to the urchaser or his solicitor shall be specified in the said con- tions of sale. 15 & 16 *Vict. c.* 86, *s.* 56.

LVII. Where any real or personal property shall form ne subject of any proceedings in the Court of Chancery, nd the Court shall be satisfied that the same will be more aan sufficient to answer all the claims thereon which ought be provided for in such suit, it shall be lawful for the iid Court at any time after the commencement of such roceedings, to allow to the parties interested therein, or ny one or more of them, the whole or part of the annual ncome of such real property, or a part of such personal roperty, or a part or the whole of the income thereof, up o such time as the said Court shall direct, and for that urpose to make such orders as may appear to the said ourt necessary or expedient. Where real or personal property is the subject of proceedings, Court may allow to parties part or the whole of the annual income.

LX. In case any of the directions herein contained with espect to the practice and course of proceeding in the said ourt of Chancery shall by mistake of parties fail to be llowed in any suit or proceeding in the said Court, it hall be lawful for the said Court, if it shall think fit, upon ayment of such costs as such Court shall direct, to make uch order giving effect to and rectifying such proceedings s may be justified by the merits of the case. In case directions as to practice, &c., not followed, Court may make order and award costs.

LXI. It shall not be lawful for the said Court of Chan- ery, in any cause or matter, to direct a case to be stated or the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any uestions of law, which in the judgment of the said Court f Chancery shall be necessary to be decided previously to he decision of the equitable question at issue between he parties. Court of Chancery not to direct cases to be stated for opinions of Court of Common Law, but to decide the same.

LXII. In cases where, according to the present practice f the Court of Chancery, such Court declines to grant quitable relief until the legal title or right of the party r parties seeking such relief shall have been established n a proceeding at law, the said Court may itself determine uch title or right without requiring the parties to proceed t law to establish the same. Court may determine legal title of party seeking relief without requiring parties to proceed to law.

21 & 22 *Vict. c.* 27.

An Act to amend the Course of Procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster.

[28th June, 1858.]

Whereas it is expedient to amend further the practice nd course of proceeding in the High Court of Chancery, he Court of Chancery in Ireland, and the Court of Chan- ery of the County Palatine of Lancaster: Be it enacted by

21 & 22 *Vict. c.* 27.

the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Commencement of Act. Short title.

I. This Act shall commence and take effect from and after the 1st day of November, 1858, and may be cited and referred to as the Chancery Amendment Act, 1858.

II. [Power to Court of Chancery to award damages in certain cases, *see infra*, p. 433.]

Damages may be assessed, or question of fact arising in any suit may be tried by a jury before the Court itself.

III. It shall be lawful for the Court of Chancery, if it shall think fit, to cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself; and the Court of Chancery may make all such rules and orders upon the sheriff, or any other person, for procuring the attendance of a special or common jury for such assessment of damages, or the trial of such question of fact, as may be made by any of the Superior Courts of common law at Westminster, and may also make any other orders which to the Court of Chancery may seem requisite; and every such jury shall consist of persons possessing the qualifications, and shall be struck, summoned, balloted for and called in like manner as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights and subject to the same duties and liabilities as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause; and generally for all purposes of or auxiliary to the assessment of damages or the trial of questions of fact by a jury before the Court itself, and in respect of new trials, the Court of Chancery shall have the same jurisdiction, powers, and authority in all respects as belong to any Superior Court of common law, or to any judge thereof, for the like purposes; provided that from any order made by the Court on an application made for a new trial there shall be the same right of appeal as from any other order of the Court.

Where parties are competent to make admissions, any party may call on any other party to admit documents.

VII. In any case in which all parties to a suit are competent to make admissions, any party may call on any other party by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the Court shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the taxing master, a saving of expense.

25 & 26 *Vict. c.* 42.

25 & 26 *Vict. c.* 42.

n Act to regulate the Procedure in the High Court of Chancery and the Court of Chancery of the County Palatine of Lancaster. [17th July, 1862.]

Whereas the High Court of Chancery has power in cerin cases to refuse or postpone the application of remedies ithin its jurisdiction, until questions of law and fact on hich the title to such remedies depends have been deterined or ascertained in one of her Majesty's Courts of comon law: And whereas it is expedient that the said power ould no longer exist, and that in all such cases every uestion of law and of fact, cognizable in a Court of comon law, arising in the said Court of Chancery, on which ie right of any party to any equitable relief or remedy epends, and whether the title to such relief or remedy be r be not incident to or dependent upon a legal right, should e determined by or before the said Court itself: And hereas the procedure of the Court of Chancery of the ounty Palatine of Lancaster has been assimilated to the rocedure of the said High Court in the matters aforesaid; nd it is expedient that the future procedure of the said ourts should also be alike: Be it enacted by the Queen's ost Excellent Majesty, by and with the advice and consent f the Lords Spiritual and Temporal, and Commons, in this resent Parliament assembled, and by the authority of the ame, as follows:

Court shall determine every question of law and fact incident to the relief sought.

I. In all cases in which any relief or remedy within the jurisdiction of the said Courts of Chancery respectively is r shall be sought in any cause or matter instituted or ending in either of the said Courts, and whether the title o such relief or remedy be or be not incident to or dependnt upon a legal right, every question of law or fact, cogniable in a Court of common law, on the determination of hich the title to such relief or remedy depends, shall be etermined by or before the same Court.

Where questions of fact may be more conveniently tried at assizes, issues may be directed.

II. Provided always, that whenever it shall appear to ither of such Courts that any question of fact may be more onveniently tried by a jury at the assizes, or at any sitting n London or Middlesex for the trial of issues in the Supeior Courts of common law, it shall be lawful for such Court, notwithstanding anything in this Act contained, to irect an issue to try any question of fact at the assizes to e held in and for any county where the same may be coneniently tried, or at any such sitting for the trial of issues n London or Middlesex as aforesaid; and (subject to such eneral orders, if any, as may hereafter be made in relation hereto) the practice hitherto existing in such Court in eference to the trial of issues shall prevail in reference to he trial of any issues directed under this proviso.

Provisions of 21 & 22

III. All the provisions with reference to the trial of uestions of fact by or before the High Court of Chancery,

25 & 26 *Vict. c.* 42, *s.* 3.

and by or before the Court of Chancery of the said County Palatine, which are contained in the Chancery Amendment Act, 1858, shall apply to the determination of questions of fact by or before the said Courts respectively under this Act.

Vict. c. 27, to apply to this Act.

Proviso in cases where object of suit to recover or defend possession of land under a legal title.

IV. Provided also, that in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage (and whether mesne profits or damages shall or shall not also be sought in such suit), such relief only shall be given in equity as would have been proper according to the rules and practice of the Court if this Act had not passed; and nothing in this Act shall make it necessary for a Court of Equity to grant relief in any suit concerning any matter as to which a Court of common law has concurrent jurisdiction, if it shall appear to the Court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a Court of common law.

Court of Chancery may sit with assistance of a common law judge.

V. Nothing in this Act contained shall alter or affect the power of the judges of the High Court of Chancery to sit with the assistance of a judge of any of her Majesty's Courts of common law.

Commencement of Act. Short title.

VI. This Act shall commence and take effect from and after the 1st day of November, 1862, and may be cited or referred to as the Chancery Regulation Act, 1862.

Statute relating to Administration.

22 & 23 *Vict. c.* 35, *s.* 29.

22 & 23 *Vict. c.* 35.

An Act to further Amend the Law of Property and to relieve Trustees.

[13th August, 1859.]

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

XXIX. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, among the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the

id assets or a part thereof, as the case may be; but thing in the present Act contained shall prejudice the ght of any creditor or claimant to follow the assets or any rt thereof into the hands of the person or persons who ay have received the same respectively. 22 & 23 *Vict. c.* 35, *s.* 29.

The following is the 33rd rule of the 35th Consolidated Order referred to, *ante*, p. 86. *Cons. Ord.* XXXV., *r.* 33.

Where any account is directed to be taken, the account- g party, unless the judge shall otherwise direct, shall ake out his account and verify the same by affidavit. he items on each side of the account shall be numbered nsecutively, and the account shall be referred to by e affidavit as an exhibit, and be left in the Judges' hambers. Accounts to be verified by affidavit, numbered, and left in Chambers.

Statutes relating to Trusts.

24 & 25 *Vict. c.* 96. 24 & 25 *Vict. c.* 96, *s.* 80.

n Act to consolidate and amend the Statute Law of England nd Ireland relating to Larceny and other similar offences. [6th August, 1861.]

LXXX. Whosoever, being a trustee of any property for he use or benefit, either wholly or partially, of some other erson, or for any public or charitable purpose, shall, with ntent to defraud, convert or appropriate the same or any art thereof to or for his own use or benefit, or the use or enefit of any person other than such person as aforesaid, r for any purpose other than such public or charitable urpose as aforesaid, or otherwise dispose of or destroy uch property or any part thereof, shall be guilty of a mis- emeanor, and being convicted thereof shall be liable, at he discretion of the Court, to any of the punishments which he Court may award as hereinbefore last mentioned: Pro- ided that no proceeding or prosecution for any offence ncluded in this section shall be commenced without the nction of Her Majesty's Attorney General, or, in case hat office be vacant, of Her Majesty's Solicitor General: rovided also, that, where any civil proceeding shall have een taken against any person to whom the provisions of his section may apply, no person who shall have taken uch civil proceeding shall commence any prosecution under his section without the sanction of the Court or judge efore whom such civil proceeding shall have been had or hall be pending. Trustees fraudulently disposing of property guilty of a misdemeanor. No prosecution shall be commenced without the sanction of some judge or the Attorney General.

LXXXV. Nothing in any of the last ten preceding sec- ons of this Act contained shall enable or entitle any person o refuse to make a full and complete discovery by answer o any bill in equity, or to answer any question or inter- ogatory in any civil proceeding in any Court, or upon the earing of any matter in bankruptcy or insolvency; and no No person to be exempt from answering questions in any Court, but no person making

24 & 25 *Vict. c.* 96, *s.* 85.

a disclosure in any compulsory proceeding to be liable to prosecution.

person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any Court of Law or Equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

No remedy at law or in equity shall be affected.

LXXXVI. Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by such offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Convictions shall not be received in evidence in civil suits.

22 & 23 *Vict. c.* 35.

An Act to further amend the Law of Property and to relieve Trustees.

[13th August, 1859.]

22 & 23 *Vict. c.* 35, *s.* 32.

As to investments by trustees.

XXXII. When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper.

23 & 24 *Vict. c.* 38.

An Act to further amend the Law of Property.

[23rd July, 1860.]

23 & 24 *Vict. c.* 38, *s.* 10.

Power to Lord Chancellors, &c., of England and Ireland to make general orders as to investment of cash

X. It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice Chancellors of the said Court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to

ke such general orders from time to time as to the in- 23 & 24
stment of cash under the control of the Court, either in *Vict. c.* 38,
: Three per Cent. Consolidated, or Reduced or New Bank *s.* 10.
nuities, or in such other stocks, funds, or securities as he
they shall, with such advice or assistance, see fit; and it under the control of
ll be lawful for the Lord Chancellor, Lord Keeper, or the Court.
rds Commissioners in England, and for the Lord Chan-
lor in Ireland, to make such orders as he or they shall
em proper for the conversion of any Three per Cent.
nk Annuities now standing or which may hereafter stand
the name of the Accountant General of the said Court of
ancery, in trust in any cause or matter, into any such
er stocks, funds, or securities upon which by any such
neral order as aforesaid, cash under the control of the
urt may be invested; all orders for such conversion of
nk Annuities into other funds or securities to be made
on petition to be presented by any of the parties inte-
ted in a summary way, and such parties shall be served
th notice thereof as the Court shall direct.

In pursuance of this enactment the following order was made the 1st of February, 1861.

"1. Cash under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in Consolidated 3*l.* per cent. Annuities, Reduced 3*l.* per cent. Annuities, and New 3*l.* per cent. Annuities.

"2. Every petition for the purpose of the conversion of any 3*l.* per cent. Bank Annuites into any other of the stocks, funds, or securities hereinbefore mentioned, shall be served upon the trustees if any of such Bank 3*l.* per cent. Annuities, and upon such other persons, if any, as the Court shall think fit."

XI. When any such general order as aforesaid shall have Trustees, &c., to invest trust funds in the stocks, &c., in which cash under the control of the Court may be invested.
en made it shall be lawful for trustees, executors, or
ministrators having power to invest their trust funds upon
vernment securities, or upon Parliamentary stocks, funds,
securities, or any of them, to invest such trust funds,
any part thereof, in any of the stocks, funds, or secu-
ies in or upon which by such general order cash under
e control of the Court may from time to time be in-
sted.

XII. Clause thirty-two of the said Act of the twenty- Clause 32 of 22 & 23 Vict. c. 35, to act retrospectively.
ond and twenty-third of Queen Victoria, chapter thirty-
e, shall operate retrospectively.

Statutes relating to Foreclosure and Redemption.

1 & 2 *Vict. c.* 110. 1 & 2 *Vict. c.* 110. *s.* 13.

Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases, for extending the Remedies

1 & 2 Vict. c. 110, s. 13.

of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16th August, 1838.]

Judgment to operate as a charge on real estate.

XIII. And be it enacted that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom such judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgment already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this Act had not passed: Provided also that nothing herein contained shall be deemed or taken to

Charge not to be enforced until after the expiration of a year.

Proviso as to purchaser, &c.

er any doctrine of courts of equity whereby protection given to purchasers for valuable consideration without ice.

23 & 24 *Vict. c.* 38.

23 & 24 *Vict. c.* 38, *s.* 1.

An Act to further amend the Law of Property.

[23rd July, 1860.]

Whereas it is desirable to place freehold, copyhold, l customary estates on the same footing with leasehold ates in respect of judgments, statutes, and recognizances against purchasers and mortgagees, and also to enable rchasers and mortgagees of estates, whether freehold, pyhold, or customary or leasehold to ascertain when exe- tion has issued on any judgment, statute, or recognizance, l to protect them against delay in the execution of the it: Be it therefore enacted, that no judgment, statute, recognizance to be entered up after the passing of this t shall affect any land (of whatever tenure) as to a *bonâ* purchaser for valuable consideration, or a mortgagee hether such purchaser or mortgagee have notice or not any such judgment, statute, or recognizance, unless a it or other due process of execution of such judgment, tute, or recognizance shall have been issued and regis- ed as hereinafter is mentioned before the execution of the nveyance or mortgage to him, and the payment of the rchase or mortgage money by him: Provided always, at no judgment, statute, or recognizance to be entered up er the passing of this Act, nor any writ of execution or ier process thereon, shall affect any land of whatever ure as to a *bonâ fide* purchaser or mortgagee, although ecution or other process shall have issued thereon, d have been duly registered, unless such execution or ier process shall be executed and put in force within three endar months from the time when it was registered.

Writs of execution of judgments to be registered.

The second section directs that the writ shall be registered in Common Pleas in the *creditor's* name. But this is altered to *debtor's* name by the 3rd section of the 27 & 28 Vict. c. 112 e *infra.)*

27 & 28 *Vict. c.* 112.

27 & 28 *Vict. c.* 112.

n Act to amend the Law relating to future Judgments, Statutes, and Recognizances.

[29th July, 1864.]

Whereas it is desirable to assimilate the law affecting ehold, copyhold, and leasehold estates to that affecting rely personal estates in respect of future judgments, tutes, and recognizances: Therefore be it enacted by the ieen's most Excellent Majesty, by and with the advice d consent of the Lords Spiritual and Temporal, and Com- ons, in this present Parliament assembled, and by the thority of the same, as follows:

27 & 28 Vict. c. 112.

I. No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance.

Future judgments, &c., not to affect land until land delivered in execution.

II. In the construction of this Act the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

Interpretation of terms.

Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38.

III. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an Act passed in the session of the 23rd and 24th years of her present Majesty, intituled An Act to further amend the Law of Property, but in the name of the debtor against whom such writ or process is issued, instead of, as under the said Act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognizance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the senior Master of the Court of Common Pleas for the purpose of such registry.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

IV. Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Where there are other creditors, notice of sale to be served upon them.

V. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefi

such charge (whether prior or subsequent to the charge the petitioner) shall be served with notice of the said der for sale, and shall after such service be bound thereby, d shall be at liberty to attend the proceedings under the me, and to have the benefit thereof; and the proceeds of ch sale shall be distributed among the persons who may found entitled thereto, according to their respective riorities. 27 & 28 Vict. c. 112, s. 5.

Parties claiming interest through debtor bound by order for sale.

VI. Every person claiming any interest in such land rough or under the debtor, by any means subsequent to e delivery of such land in execution as aforesaid, shall be ound by every such order for sale, and by all the proceed- gs consequent thereon.

Statute relating to Specific Performance.

21 & 22 *Vict. c.* 27.

An Act to amend the Course of Procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the County Palatine of Lancaster

[28th June, 1858.]

21 & 22 Vict. c. 27.

Power to Court of Chancery to award damages in certain cases.

II. In all cases in which the Court of Chancery has juris- iction to entertain an application for an injunction against breach of any covenant, contract, or agreement, or against ne commission or continuance of any wrongful act, or for ne specific performance of any covenant, contract, or agree- nent, it shall be lawful for the same Court, if it shall think t, to award damages to the party injured, either in addi- ion to or in substitution for such injunction or specific per- ormance, and such damages may be assessed in such man- er as the Court shall direct.

Trustees Relief Acts.

10 & 11 *Vict. c.* 96.

An Act for better securing Trust Funds, and for the Relief of Trustees.

[22nd July, 1847.]

10 & 11 Vict. c. 96.

Whereas it is expedient to provide means for better ecuring trust funds, and for relieving trustees from the esponsibility of administering trust funds in cases where hey are desirous of being so relieved: Be it enacted by the Queen's most Excellent Majesty, by and with the advice nd consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by he authority of the same, that all trustees, executors, admi- istrators, or other persons, having in their hands any ionies belonging to any trust whatsoever, or the major art of them, shall be at liberty, on filing an affidavit shortly escribing the instrument creating the trust, according to

Trustees may pay trust monies or transfer stocks and securities into the Court of Chancery.

10 & 11 Vict. c. 96.

the best of their knowledge and belief, to pay the same, with the privity of the Accountant General of the High Court of Chancery, into the Bank of England, to the account of such Accountant General in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court; and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of England, or of the East India Company or South Sea Company, or any Government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

Receipt of bank cashier, or certificate of proper officer, to be sufficient discharge.

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trust.

II. And be it enacted, that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted.

Regulating salary of Accountant General.

III. Provided always, and be it enacted, that the additional remuneration which the said Accountant General may receive in consequence of the operation of this Act shall not have the effect of giving to him any claim for a larger income by way of salary or otherwise, in the event of

te said office of Accountant General being hereafter regu- 10 & 11 *Vict. c.* 96, *s.* 3.
ted by competent authority, than would have been as-
gned to him if this Act had not been passed.

IV. And be it enacted, that the Lord Chancellor, with Lord Chancellor, with Master of the Rolls, &c., may make general orders.
e assistance of the Master of the Rolls or of one of the
ice Chancellors, shall have power and is hereby authorized
make such orders as from time to time shall seem neces-
ry for better carrying the provisions of this Act into
fect.

V. And be it enacted, that in the construction of this Construction of expression "Lord Chancellor."
ct the expression "the Lord Chancellor" shall mean and
clude the Lord Chancellor, Lord Keeper, and Lords
ommissioners for the custody of the Great Seal of Great
ritain for the time being.

VI. And be it enacted, that this Act may be amended or Act may be amended, &c.
ppealed by any Act to be passed in this present session of
arliament.

The following are the orders made under the 4th section
ons. Ord. XLI. rr. 1—9.):—

1. Any trustee desiring to pay money to the account of, or transfer or deposit stock or securities into or in the name of the Accountant General, under the stat. 10 & 11 Vict. c. 96, shall file an affidavit, entitled in the matter of the Act and in the matter of the trust, and setting forth— Affidavit of trustee.
   (1.) His own name and address.
   (2.) The place where he is to be served with any petition, or any notice of any proceeding or order of the Court, or of the Judge in Chambers relating to the trust fund.
   (3.) The amount of money, stock, or securities which he proposes to pay or transfer into or deposit in Court to the credit of the trust.
   (4.) A short description of the trust and of the instrument creating it.
   (5.) The names of the persons interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
   (6.) The submission of the trustee to answer all such inquiries relating to the application of the money, stock, or securities, paid in, transferred, or deposited under the Act, as the Court or the Judge in Chambers may think proper to make or direct.
2. The Accountant General, on production of an office copy of the affidavit, shall give the necessary directions for payment, transfer, or deposit, and place the money, stock, or securities to the account of the particular trust; and such payment, transfer, or deposit shall be certified in the usual manner. Payment, &c, how directed and certified.
3. Where it is deemed unnecessary to have the money or Statement as to non-investment.

Cons. Order 41, *rr.* 1—9.

the dividends, or interest of stock, or securities invested in the meantime, the affidavit shall further contain a statement to that effect. But where the affidavit contains no such statement, the Accountant General shall be at liberty to invest, as soon as conveniently may be, the money in Bank Three per Cent. Annuities in the matter of the particular trust, or in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such money shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time in the like manner, without any special order made by the Court in that behalf, and without any formal request for that purpose: Provided always, that where at any time a request in writing, by or on behalf of any party claiming to be entitled, that such investment be discontinued, is left with the Accountant General, he shall be at liberty to cease making any further investment in the matter of the particular trust until the Court shall have made some order in that behalf.

Investment where no such statement.

Notice of payment, &c.

4. The trustee, having made the payment, transfer, or deposit, shall forthwith give notice thereof to the several persons named in his affidavit as interested in or entitled to the fund.

Application by petition or summons, by whom made.

5. Such persons, or any of them, or the trustee may apply by petition, or, in cases where the trust fund does not exceed 300*l.* cash, or 300*l.* stock, by summons, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

Notice to trustee.

6. The trustee shall be served with notice of any application made to the Court, or to the Judge in Chambers, respecting the fund or the dividends, or interest thereof, by any person interested therein or entitled thereto.

Notice to *cestui que trust.*

7. The persons interested in or entitled to the fund shall be served with notice of any application made by the trustee to the Court, or to the judge in Chambers, respecting the fund in Court, or the interest or dividends thereof.

Place for service.

8. No petition shall be set down to be heard, and no summons shall be sealed until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons, or notice of any proceeding or order of the Court relating to the trust fund.

Title of petitions, &c.

9. Petitions presented, summonses issued, and affidavits filed under the said Act, shall be entitled in the matter of the said Act (10 & 11 Vict. c. 96), and in the matter of the particular trust.

12 & 13 *Vict. c.* 74.

An Act for the further Relief of Trustees.

[28th July, 1849.]

Whereas difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the session of Parliament holden in the ninth and eleventh years of the reign of Her present Majesty, intituled An Act for better securing Trust Funds and for the Relief of Trustees, and it is expedient to make further provision for carrying into effect the objects of the said recited Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if, upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act, it shall appear to the Judge of the Court of Chancery before whom such petition shall be heard that any monies, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such monies or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such judge as aforesaid to make such order for payment or delivery of such monies, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant General or to the said judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order.

10 & 11 Vict. c. 96.

Court of Chancery may, upon application by majority of trustees, &c., order payment or transfer of trust monies, stocks, or securities into Court of Chancery.

II. And be it enacted, that this Act may be amended or repealed in the present session of Parliament.

Act may be amended, &c.

13 & 14 *Vict. c.* 35.

13 & 14 *Vict. c.* 35.

An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England.

[15th July, 1850.]

Court, on application of executors or administrators, may by order of course direct it to be referred to a master to take an account of debts and liabilities.

XIX. And whereas it is expedient to provide means for enabling executors or administrators of deceased persons to ascertain whether there are any outstanding debts or liabilities affecting the personal estates of such persons, without the delay and expense of suits to administer such estates. Be it therefore enacted, that it shall be lawful for the said Court, upon the application of the executors or administrators of any deceased person, by order to be made upon motion or petition of course, and to be in the form or to the effect set forth in the Schedule hereto, with such variations as circumstances may require, to refer it to one of the Masters of the said Court to take an account of the debts and liabilities affecting the personal estate of such deceased person, and to report thereon. Provided always, that no such order shall be made until the expiration of one year next after the death of such deceased person, or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the said Court by such decree or order to stay or suspend the proceedings under such order of course on such terms and conditions, if any, as to the said Court shall seem just.

This altered by 23 & 24 Vict. c. 38, s. 14, *infra*, p. 442.

Master's report may be objected to by motion to the Court, of which notice shall be given.

XX. And be it enacted, that it shall be lawful for any person who may have come in before the master under any such order, and claimed to be a creditor upon the estate of the deceased person, or to have any demand upon such estate by reason of any liability, and whose debt or claim may not have been wholly allowed by the said master, to apply to the said Court by motion, of which notice shall be given within fourteen days after the filing of the master's report, to have such claim allowed by the Court, either wholly or partially; and it shall be lawful for the said executors or administrators, and for any creditor of the deceased person who may be authorized by special leave of the said Court so to do, to apply to the said Court by motion, of which notice shall be given within the time aforesaid, to have any debt or claim allowed by the said master disallowed by the Court, either wholly or partially; and at the expiration of fourteen days after the filing of the said report the same shall, except as to any debt or claim as to which any such notice as aforesaid may have been given, be absolute, as if the same had been confirmed by order of the Court.

XXI. And be it enacted, that upon the hearing of any such motion as aforesaid the said Court may either dismiss such motion, or may order the debt or claim to which such motion relates to be allowed or disallowed, as the case may be, and either wholly or partially, or may direct further inquiry or further proceedings by way of action or otherwise, touching such debt or claim, and after such inquiry or proceedings may, upon further motion, deal with such debt or claim as to the said Court shall seem just: Provided always, that no new evidence shall be received by the said Court upon the hearing of any such motion without special leave of the said Court. 13 & 14 *Vict. c.* 35, *s.* 21. Proceeding of the Court on such motion.

XXII. And be it enacted, that in case any debt or any certain liability shall have been allowed as aforesaid, and shall not within fourteen days after the report has become absolute as to such debt or liability, or after the same shall have been allowed by the said Court, be paid or provided for by appropriation to the satisfaction of the person who has established such liability, it shall be lawful for the said Court, by order to be made in case of any debt remaining due, upon the application by motion or petition of the person to whom the debt remains due, and on notice to the executors or administrators, and in case of any certain liability remaining unprovided for by appropriation, upon the application by motion or petition of the person by whom such liability has been established, or of the executors or administrators, and on notice by the party applying to the other of them, to order payment of the debts which may have been allowed and remain unpaid, and to provide for the certain liabilities which may have been allowed and remain unprovided for, in like manner as the same could or might have been paid or provided for in a suit for that purpose instituted by bill, or to refer it to the master to take an account of the debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for, and also the usual accounts of the personal estate of the deceased person, with all usual and proper directions; and every such order shall have the same force and effect and shall be prosecuted and carried on in like manner as a decree in a creditor's suit instituted by bill. If debts or certain liabilities allowed, and not paid or provided for, order may be made for payment or accounts.

XXIII. And be it enacted, that in case any contingent liability shall be allowed by the said report or by the said Court, it shall be lawful for the said Court, by order, to be made upon the application of the executors or administrators, by motion or petition, on notice to the person who may have established such contingent liability, to order such sum of money, part of the estate of the deceased person as to the said Court shall seem just, to be set aside and appropriated for answering such contingent liability, and to give such directions as the said Court shall think fit touching the payment of such sum of money into Court, and the investment thereof, and the payment, application, or accu- Court, on application of executors or administrators, may direct appropriation of money to answer contingent liability.

13 & 14 *Vict.* c. 35, s. 23.

mulation of the interest or dividends thereof in the meantime and until the same shall be required to answer such liability, and when such liability shall be ascertained or determined to give such directions as to the payment of such sum out of Court as the said Court shall deem right. Provided always, that no order to be made as aforesaid shall in any manner bind the assets so appropriated as against the persons entitled to the estate of the deceased, subject to the contingent liability; and any person interested in such appropriated assets may apply to the Court touching the same as he may be advised.

Court may restrain proceedings against executors and administrators.

XXIV. And be it enacted, that after the filing of such report as aforesaid it shall be lawful for the said Court, upon the application of the executors or administrators of the deceased, by order to be made on motion, to restrain by injunction any proceedings at law against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability other than the persons who may have established contingent liabilities under the said order for which no appropriation may have been made.

Protection to be afforded to executors and administrators.

XXV. And be it enacted, that in case no debt or liability, or no debt or liability other than a contingent liability, shall have been allowed as aforesaid, or in case any debt or liability other than as aforesaid shall be allowed as aforesaid, then after the same shall have been paid or provided for by appropriation as aforesaid, all payments made by the executors or administrators, or any of them, on account of the estate of the deceased person, and all dispositions of such assets made by them or any of them on account of such estate shall, as against all persons having or claiming to have any demand upon such estate by reason of any debt or liability other than persons who may have established under the said order any contingent liability for which no such appropriation as aforesaid may have been made, be as good and effectual as if the same had been made under a decree of the said Court. Provided always, that nothing herein contained shall in any manner affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased against any assets so paid or disposed of, or against the persons to whom such payment or disposition may have been made, or against any assets appropriated under the provisions of this Act, and the appropriation of which, if made under a decree of the said Court in a suit to which he was not a party, would not have been binding upon him.

SCHEDULE referred to by the foregoing Act.

[*Date.*]

In the matter of *A.B.* late of in the county of Banker [*or as the case may be*], deceased. Upon motion this day made unto this Court by Mr.

of Counsel for *C.D.* of the executor [*or* administrator] of the above named *A.B.* [*or* upon the humble petition of *C.D.* of the executor (*or* administrator) of the said *A.B.*, this day preferred unto the Right Honourable the Master of the Rolls for the reasons therein contained], it is ordered that it be referred to the master of this Court in rotation to take an account of the debts and liabilities affecting the personal estate of the said *A.B.*, and to compute interest on such of the said debts and liabilities as carry interest after the rate of interest the same respectively carry; and the said master is to cause an advertisement to be published in the *London Gazette* and such other public papers as he shall think fit for the persons claiming in respect of any such debts or liabilities to come in before the said master, and prove their debts and claims, and he is to fix a peremptory day for that purpose, and such of the said creditors as shall not come in and prove their debts and claims by the time so to be limited are to be excluded the benefit of this order. And it is ordered, that the said master do distinguish debts from liabilities, and liabilities certain from liabilities contingent. And it is ordered, that the personal estate of the said *A.B.* be applied in payment and satisfaction of such debts and liabilities of the said *A.B.* in a due course of administration; and for the better taking the said accounts and discovery of the matters aforesaid the parties are to produce before the said master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories as the said master shall direct; and any of the parties are to be at liberty to apply to the Court as there shall be occasion.

13 & 14 *Vict. c.* 35.

22 & 23 *Vict. c.* 35.

22 & 23 *Vict. c.* 35.

An Act to further amend the Law of Property and to relieve Trustees.

[13th August, 1859.]

XXX. Any trustee, executor or administrator, shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons upon a written statement to any such judge at Chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application; provided nevertheless that this Act

Trustee, executor, &c., may apply by petition to judge of Chancery for opinion, advice, &c., in management, &c., of trust property.

22 & 23 *Vict. c.* 35.

shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the same application shall be made.

23 & 24 *Vict. c.* 38.

23 & 24 *Vict. c.* 38.

An Act to further amend the Law of Property.

[23rd July, 1860.]

Order to take account of debts, &c., of deceased person under sect. 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted.

XIV. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to the 19th section of the Act 13 & 14 Vict. c. 35, may be made immediately, or at any time, after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said Court, sitting at Chambers, upon a summons in the form used for originating proceedings at Chambers; and after any such order shall have been made, the said Court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the 29th section of the Act 22 & 23 Vict. c. 35.

THE TRUSTEE ACT, 1850.

13 & 14 *Vict. c.* 60.

13 & 14 *Vict. c.* 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.

[5th August, 1850.]

Whereas an Act was passed in the first year of the reign

ff his late Majesty King William IV., intituled an Act for mending the Laws respecting Conveyances and Transfers ff Estates and Funds vested in Trustees and Mortgagees, md for enabling Courts of Equity to give effect to their Decrees and Orders in certain Cases. And whereas an Act ras passed in the fifth year of the reign of his late Majesty King William IV., intituled An Act for the Amendment ff the Law relative to the Escheat and Forfeiture of Real md Personal Property holden in Trust. And whereas an Act was passed in the second year of the reign of her present Majesty, intituled An Act to remove doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees. And whereas it is expedient that the provisions of the said Acts should be consolidated and enlarged: e it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords piritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that ll proceedings under the said Acts or any of them commenced before the passing of this Act may be proceeded vith under the said recited Acts, or according to the provisions of this Act, as shall be thought expedient, and, subject s aforesaid, that the said recited Acts shall be and the ame are hereby repealed: Provided always, that the everal Acts repealed by the said recited Acts shall not e revived, and that such repeal shall only be on and after his Act coming into operation.

13 & 14 Vict. c. 60.

11 G. 4 & 1 Wm. 4, c. 60.

4 & 5 Wm. 4, c. 23.

1 & 2 Vict. c. 60.

II. And whereas it is expedient to define the meaning in which certain words are hereafter used: it is declared that he several words hereinafter named are herein used and pplied in the manner following respectively; (that is to ay,)

Interpretation of terms.

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure, or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any Company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein:

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or

13 & 14 Vict. c. 60, s. 2.

be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of his late Majesty King William IV., intituled An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple modes of Assurance, and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands:

3 & 4 W. 4, c. 74.

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any lord keeper or lords commissioners of the great seal for the time being:

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any keeper or lords commissioners of the great seal of Ireland for the time being:

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person:

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo:

The expression "person of unsound mind" shall mean

any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs : 13 & 14 *Vict. c.* 60, *s.* 2.

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a Court of equity be deemed merely a security for money :

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

Lord Chancellor may convey estates of lunatic trustees and mortgagees;

III. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

may convey contingent rights.

IV. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

V. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with

13 & 14 *Vict. c.* 60, *s.* 5.

any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

Power to transfer stock of deceased person.

VI. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor intrusted as aforesaid to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey estates of infant trustees and mortgagees.

VII. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent rights of infant trustees and mortgagees.

VIII. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the Court.

IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Court may make order in cases where persons are seised of lands jointly

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly

ssed or possessed, or in such last mentioned person or rsons together with any other person or persons, in such anner and for such estate, as the said Court shall direct; id they shall have the same effect as if the trustee out of e jurisdiction, or who cannot be found, had duly executed conveyance or assignment of the lands in the same manner the same estate. 13 & 14 *Vict. c.* 60, *s.* 10.

with parties out of jurisdiction of Court, &c.

XI. And be it enacted, that when any person solely enti- d to a contingent right in any lands upon any trust shall out of the jurisdiction of the Court of Chancery, or nnot be found, it shall be lawful for the said Court to make order wholly releasing such lands from such contingent ght, or disposing of the same to such person or persons as e said Court shall direct; and the order shall have the me effect as if the trustee had duly executed a conveyance releasing or disposing of the contingent right.

Contingent rights of trustees.

XII. And be it enacted, that when any person jointly titled with any person or persons to a contingent right in y lands upon any trust shall be out of the jurisdiction of e Court of Chancery, or cannot be found, it shall be law- l for the said Court to make an order disposing of the ntingent right of the person out of the jurisdiction, who cannot be found, to the person or persons so intly entitled as aforesaid, or to such last mentioned person persons together with any other person or persons; and e order shall have the same effect as if the trustee out of the risdiction, or who cannot be found, had duly executed a nveyance so releasing or disposing of the contingent right.

Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the Court to a contingent right in lands.

XIII. And be it enacted, that where there shall have een two or more persons jointly seised or possessed of any nds upon any trust, and it shall be uncertain which of ch trustees was the survivor, it shall be lawful for the ourt of Chancery to make an order vesting such lands in ch person or persons in such manner and for such estate the said Court shall direct; and the order shall have the me effect as if the survivor of such trustees had duly xecuted a conveyance or assignment of the lands in the me manner for the same estate.

When it is uncertain which of several trustees was the survivor.

XIV. And be it enacted, that where any one or more erson or persons shall have been seised or possessed of any nds upon any trust, and it shall not be known, as to the trustee st known to have been seised or possessed, whether he be ving or dead, it shall be lawful for the Court of Chancery make an order vesting any such lands in such person or ersons in such manner and for such estate as the said ourt shall direct; and the order shall have the same ffect as if the last trustee had duly executed a convey- nce or assignment of the lands in the same manner for the me estate.

When it is uncertain whether the last trustee be living or dead.

XV. And be it enacted, that when any person seised of ny lands upon any trust shall have died intestate as to ch lands without an heir, or shall have died and it shall ot be known who is his heir or devisee, it shall be lawful

When trustee dies without an heir.

13 & 14 *Vict. c.* 60, *s.* 15.

for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Contingent right of unborn trustee.

XVI. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons, who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Power to convey in place of a refusing trustee.

XVII. And be it enacted, that where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Power to convey in place of person entitled to contingent right.

XVIII. And be it enacted, that where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct; and the order shall have the same effect as if the trustees so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right.

XIX. And be it enacted, that when any person to whom

13 & 14 *Vict. c.* 60, *s.* 19.

ıy lands have been conveyed by way of mortgage shall ıve died without having entered into the possession or into ıe receipt of the rents and profits thereof, and the money ıe in respect of such mortgage shall have been paid to a ɔrson entitled to receive the same, or such last mentioned ɔrson shall consent to an order for the reconveyance such lands, then in any of the following cases it shall be wful for the Court of Chancery to make an order vesting ıch lands in such person or persons in such manner and for ıch estate as the said Court shall direct; that is to say,

Power to convey in place of mortgagee.

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found.

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorized agent of such last mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last mentioned person:

When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee:

ınd the order of the said Court of Chancery made in any ne of the foregoing cases shall have the same effect as if the eir or devisee or surviving devisee, as the case may be, had uly executed a conveyance or assignment of the lands in ıe same manner and for the same estate.

Power to appoint a person to convey in certain cases.

XX. And be it enacted, that in every case where the ord Chancellor, intrusted as aforesaid, or the Court of hancery, shall under the provisions of this Act, be enabled ɔ make an order having the effect of a conveyance or ssignment of any lands, or having the effect of a release or isposition of the contingent right of any person or persons, orn or unborn, it shall also be lawful for the Lord Chanellor, intrusted as aforesaid, or the Court of Chancery, as ıe case may be, should it be deemed more convenient, ɔ make an order appointing a person to convey or assign ıch lands, or release or dispose of such contingent right; nd the conveyance or assignment, or release or disposition, f the person so appointed, shall, when in conformity with ıe terms of the order by which he is appointed, have the ame effect, in conveying or assigning the lands, or releasing r disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chanery, would in the particular case have had under the pro-

13 & 14 *Vict. c.* 60, *s.* 20.

visions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other Company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant general for the time being of the Governor and Company of the Bank of England, or any officer of such other Company or Society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other Companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto.

As to lands in Lancaster and Durham.

XXI. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the counties palatine of Lancaster or Durham, it shall be lawful for the court of the duchy chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same Courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the duchy chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: Provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act.

When trustees of stock out of the jurisdiction.

XXII. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last mentioned person or persons together with any person or persons the said Court may appoint; and when any sole trustee or any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be

ring or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, to receive the dividends or income thereof, or to sue r and recover such chose in action, or any interest in spect thereof, in any person or persons the said Court ay appoint. 13 & 14 *Vict. c.* 60, *s* 22.

XXIII. And be it enacted, that where any sole trustee any stock or chose in action shall neglect or refuse to ansfer such stock, or to receive the dividends or income ereof, or to sue for or recover such chose in action, or y interest in respect thereof, according to the direction the person absolutely entitled thereto, for the space of venty-eight days next after a request in writing for that urpose shall have been made to him by the person abso- tely entitled thereto, it shall be lawful for the Court of hancery to make an order vesting the sole right to trans- r such stock, or to receive the dividends or income thereof, to sue for and recover such chose in action, or any terest in respect thereof, in such person or persons as the id Court may appoint. When trustee of stock refuses to transfer.

XXIV. And be it enacted, that where any one of the ustees of any stock or chose in action shall neglect or fuse to transfer such stock, or to receive the dividends income thereof, or to sue for or recover such chose in tion according to the directions of the person absolutely ntitled thereto, for the space of twenty-eight days next after request in writing for that purpose shall have been made to m or her by such person, it shall be lawful for the Court Chancery to make an order vesting the right to transfer ch stock, or to receive the dividends or income thereof, to sue for and recover such chose in action, in the other ustee or trustees of the said stock or chose in action, or any person or persons whom the said Court may appoint intly with such other trustee or trustees. When one of several trustees of stock refuses to transfer or receive and pay over dividends.

XXV. And be it enacted, that when any stock is standing the sole name of a deceased person, and his or her per- nal representative shall be out of the jurisdiction of the ourt of Chancery, or cannot be found, or it shall be ncertain whether such personal representative be living or ead, or such personal representative shall neglect or refuse transfer such stock, or receive the dividends or income ereof, according to the direction of the person absolutely ntitled thereto, for the space of twenty-eight days next ter a request in writing for that purpose shall have been ade to him by the person entitled as aforesaid, it shall be wful for the Court of Chancery to make an order vesting e right to transfer such stock, or to receive the dividends income thereof, in any person or persons whom the said ourt may appoint. When stock is standing in the name of a deceased person.

XXVI. And be it enacted, that where any order shall ve been made under any of the provisions of this Act sting the right to any stock in any person or persons pointed by the Lord Chancellor, intrusted as aforesaid, Effect of an order vesting the legal right to transfer stock.

13 & 14 *Vict. c.* 60, *s.* 26.

or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all Companies and Associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

Effect of an order vesting legal right in a chose in action.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

XXVIII. And be it enacted, that whensoever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as

foresaid, or the Court of Chancery, appointing any person persons to convey or assign any copyhold or customary nds, it shall be lawful for such person or persons to do all tts and execute all instruments for the purpose of complet- g the assurance of such lands; and all such acts and in- ruments so done and executed shall have the same effect, ad every lord and lady of a manor, and every other person, all, subject to the customs of the manor, and the usual yments, be equally bound and compellable to make lmittance to such lands, and to do all other Acts for the rpose of completing the assurance thereof, as if the per- ns in whose place an appointment shall have been made, ing free from any disability, had duly done and executed ch acts and instruments. 13 & 14 *Vict. c.* 60, *s.* 28.

When a decree is made for sale of real estate for payment of debts.

XXIX. And be it enacted that when a decree shall have en made by any Court of Equity directing the sale of any nds for the payment of the debts of a deceased person, ery person seised or possessed of such lands, or entitled to contingent right therein, as heir, or under the will of a ceased debtor, shall be deemed to be so seised or possessed entitled, as the case may be, upon a trust within the eaning of this Act; and the Court of Chancery is hereby npowered to make an order wholly discharging the con- ngent right, under the will of such deceased debtor, of any born person.

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

XXX. And be it enacted, that where any decree shall be ade by any Court of Equity for the specific performance a contract concerning any lands, or for the partition or change of any lands, or generally when any decree shall e made for the conveyance or assignment of any lands, ther in cases arising out of the doctrine of election or herwise, it shall be lawful for the said Court to declare at any of the parties to the said suit wherein such decree made are trustees of such lands or any part thereof, within e meaning of this Act, or to declare concerning the terests of unborn persons who might claim under any rty to the said suit, or under the will or voluntary settle- ent of any person deceased who was during his lifetime a rty to the contract or transactions concerning which such cree is made, that such interests of unborn persons are e interests of persons who upon coming into existence ould be trustees within the meaning of this Act, and there- on it shall be lawful for the Lord Chancellor, intrusted aforesaid, or the Court of Chancery, as the case may be, make such order or orders as to the estates, rights and terests of such persons, born or unborn, as the said Court the said Lord Chancellor might under the provisions of is Act make concerning the estates, rights, and interests trustees born or unborn.

Power to make directions how the right to

XXXI. And be it enacted, that it shall be lawful for e Lord Chancellor, intrusted as aforesaid, or the Court of ancery, to make declarations and give directions concern-

13 & 14 *Vict. c.* 60, *s.* 31.

ing the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

transfer stock to be exercised.

Power to Court to make order appointing new trustees.

XXXII. And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees.

The new trustees to have the powers of trustees appointed by decree in suit.

XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Power to Court to vest lands in new trustees.

XXXIV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

Power to Court to vest right to sue at law in new trustees.

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

Old trustees not to be discharged from liability.

XXXVI. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

XXXVII. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock or chose in action, whether under disability or not, or upon the application of any person duly

pointed as a trustee thereof; and that an order under any the provisions hereinbefore mentioned concerning any nds, stock, or chose in action subject to a mortgage may made on the application of any person beneficially erested in the equity of redemption, whether under disility or not, or of any person interested in the monies cured by such mortgage. 13 & 14 *Vict. c.* 60, *s.* 37.

XXXVIII. And be it enacted, that when any person all deem himself entitled to an order under any of the ovisions hereinbefore contained, either from the Lord ancellor, intrusted as aforesaid, or from the Court of ancery, it shall be lawful for him to exhibit before any e of the masters of the High Court of Chancery a statent of the facts whereon such order is sought to be tained, and adduce evidence in support thereof; and if ch evidence shall be satisfactory to the said master, he all, at the request of the person adducing such evidence, ve a certificate under his hand of the several material cts found by him to be true, and of his opinion that such rson is entitled to an order in the form set forth in such rtificate. Power to go before the master in the first instance.

XXXIX. And be it enacted, that any person who shall ve obtained such certificate may apply by motion to the urt of Chancery, or to the Lord Chancellor, intrusted as resaid, for an order to the effect set forth in such certifi- te, or for such other order as such person may deem nself entitled to upon the facts found by the master. Power to petition the Court or the Lord Chancellor.

XL. And be it enacted, that any person or persons titled in manner aforesaid to apply for an order from the d Court of Chancery, or from the Lord Chancellor, in- sted as aforesaid, may, should he so think fit, present a tition in the first instance to the Court of Chancery, or the Lord Chancellor, intrusted as aforesaid, for such der as he may deem himself entitled to, and may give dence by affidavit or otherwise in support of such peti- n before the said Court, or the Lord Chancellor, intrusted aforesaid, and may serve such person or persons with tice of such petition as he may deem entitled to service reof. Power to present petition in the first instance.

XLI. And be it enacted, that upon the hearing of any h motion or petition it shall be lawful for the said Court for the said Lord Chancellor, should it be deemed neces- y, to direct a reference to one of the masters in ordinary the Court of Chancery to inquire into any facts which uire such an investigation, or it shall be lawful for the d Court or for the said Lord Chancellor to direct such tion or petition to stand over, to enable the petitioner or itioners to adduce evidence or further evidence before said Court or before the said Lord Chancellor, or to able notice or any further notice of such motion or ition to be served upon any person or persons. What may be done upon petition.

XLII. And be it enacted, that upon the hearing of any Court may dismiss peti-

13 & 14 *Vict. c.* 60, *s.* 42.

such motion or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

tion, with or without costs.

Power to make an order in a cause.

XLIII. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act.

Orders made by the Court of Chancery, founded on certain allegations to be conclusive evidence of the matter contained in such allegations.

XLIV. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any Court of law or equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or reassignment of any lands conveyed or assigned by any order under this Act, or a redisposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Trustees of charities.

XLV. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee

trustees shall have been duly appointed by any power mntained in any deed or instrument, or by the decree of ee said Court of Chancery, or by order made upon a ttition to the said Court under any statute authorizing ee said Court to make an order to that effect in a summary ay upon petition. 13 & 14 *Vict. c.* 60, *s.* 45.

XLVI. And be it enacted, that no lands, stock, or chose : action vested in any person upon any trust or by way of ortgage, or any profits thereof, shall escheat or be for- ited to Her Majesty, her heirs or successors, or to any rporation, lord or lady of a manor, or other person, by ason of the attainder or conviction for any offence of such ustee or mortgagee, but shall remain in such trustee or ortgagee, or survive to his or her co-trustee, or descend vest in his or her representative, as if no such attainder conviction had taken place. No escheat of property held upon trust or mortgage.

XLVII. And be it enacted, that nothing contained in this ct shall prevent the escheat or forfeiture of any lands or ersonal estate vested in any such trustee or mortgagee, so r as relates to any beneficial interest therein of any such ustee or mortgagee, but such lands or personal estate, so r as relates to any such beneficial interest, shall be coverable in the same manner as if this Act had not assed. Act not to prevent escheat or forfeiture of beneficial interest.

XLVIII. And be it enacted, that where any infant or erson of unsound mind shall be entitled to any money pay- ble in discharge of any lands, stock, or chose in action con- eyed, assigned, or transferred under this Act, it shall be wful for the person by whom such money is payable to ay the same into the Bank of England, in the name and ith the privity of the accountant general, in trust in any use then depending concerning such money, or, if there all be no such cause, to the credit of such infant or per- n of unsound mind, subject to the order or disposition of e said Court; and it shall be lawful for the said Court, pon petition in a summary way, to order any money so id to be invested in the public funds, and to order pay- ent or distribution thereof, or payment of the dividends ereof, as to the said Court shall seem reasonable; and very cashier of the Bank of England who shall receive any ch money, is hereby required to give to the person ying the same a receipt for such money, and such receipt all be an effectual discharge for the money therein re- ectively expressed to have been received. Money of infants and persons of unsound mind to be paid into Court.

XLIX. And be it enacted, that where in any suit com- enced or to be commenced in the Court of Chancery, it all be made to appear to the Court by affidavit, that ligent search and inquiry has been made after any person ade a defendant, who is only a trustee, to serve him with e process of the Court, and that he cannot be found, it all be lawful for the said Court to hear and determine ch cause, and to make such absolute decree therein Court may make a decree in the absence of a trustee.

13 & 14 *Vict. c.* 60, *s.* 49.

against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

Powers of the master.

L. And be it enacted, that when any person shall, under the provisions of this Act, apply to one of the Masters of the Court of Chancery in the first instance, and adduce evidence for the purpose of obtaining the certificate of such master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this Act shall be enforced by the same process as orders of the Court made in any suit against a party thereto.

Costs may be paid out of the estate.

LI. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Commission concerning person of unsound mind.

LII. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ *de lunatico inquirendo* shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Suit may be directed.

LIII. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

Powers of Court of

LIV. And be it enacted, that the powers and authorities

ven by this Act to the Court of Chancery in England all extend to all lands and personal estate within the minions, plantations, and colonies belonging to Her ajesty (except Scotland). 13 & 14 *Vict. c.* 60, *s.* 54.

LV. And be it enacted, that the powers and authorities ven by this Act to the Court of Chancery in England all and may be exercised in like manner, and are hereby ven and extended to the Court of Chancery in Ireland tth respect to all lands and personal estate in Ireland. Chancery to extend to property in the colonies. Powers given to Court of Chancery

LVI. And be it enacted, that the powers and authorities ven by this Act to the Lord Chancellor of Great Britain, trusted as aforesaid, shall extend to all lands and personal tate within any of the dominions, plantations, and colonies longing to Her Majesty (except Scotland and Ireland). may be exercised by that Court in Ireland.

LVII. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great ritain, intrusted as aforesaid, shall and may be exercised like manner by, and are hereby given to the Lord Chanllor of Ireland, intrusted as aforesaid, with respect to all nds and personal estate in Ireland. Powers of Lord Chancellor in lunacy to extend to property in the colonies.

LVIII. And be it enacted, that in citing this Act in her Acts of Parliament, and in legal instruments and in gal proceedings, it shall be sufficient to use the expresn "The Trustee Act, 1850." Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland.

LIX. And be it enacted, that this Act shall come into peration on the first day of November, one thousand eight ndred and fifty. Short title. Commencement of Act

LX. And be it enacted, that this Act may be repealed by any Act to be passed in this Session of arliament. Act may be amended, &c.

The Trustee Extension Act, 1852.

15 & 16 *Vict. c.* 55.

An Act to extend the Provisions of the Trustee Act, 1850.

[20th June, 1852.]

Whereas it is expedient to extend the provisions of the rustee Act, 1850: Be it therefore enacted by the Queen's ost Excellent Majesty, by and with the advice and consent the Lords Spiritual and Temporal, and Commons, in this esent Parliament assembled, and by the authority of the me— 15 & 16 *Vict. c.* 55.

I. That when any decree or order shall have been made any Court of Equity directing the sale of any lands for y purpose whatever, every person seised or possessed of ch land, or entitled to a contingent right therein, being a rty to the suit or proceeding in which such decree or der shall have been made, and bound thereby, or being herwise bound by such decree or order, shall be deemed be so seised or possessed or entitled (as the case may) upon a trust within the meaning of the Trustee Act, Court of Chancery may make an order for vesting the estate, in lieu of conveyance by a party to the suit after a decree or order for sale.

14 & 15 *Vict. c.* 55, *s.* 1.

1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release.

II. That sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustees had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

III. That when any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them, together with any other person or persons the said Court may appoint.

On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer in such person as the Court shall appoint.

IV. That where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

15 & 16 *Vict. c.* 55, *s.* 5.

'V. When any stock shall be standing in the sole name of deceased person, and his personal representative shall ffuse or neglect to transfer such stock, or receive the divi- ends or income thereof, for the space of twenty-eight days xt after an order of the Court of Chancery for that pur- se shall have been served upon him, it shall be lawful for e Court of Chancery to make an order vesting the right transfer such stock, or to receive the dividends or income ereof, in any person or persons whom the said Court may ppoint.

On like neglect by executor, similar order may be made.

Bank of England and Companies to comply with such orders.

VI. When any order being or purporting to be under is Act or under the Trustee Act, 1850, shall be made by e Lord Chancellor intrusted as aforesaid, or by the Court Chancery, vesting the right to any stock, or vesting the ght to transfer any stock, or vesting the right to call for e transfer of any stock, in any person or persons, in ery such case the legal right to transfer such stock shall est accordingly; and the person or persons so appointed all be authorized and empowered to execute all deeds and owers of attorney, and to perform all acts relating to the ansfer of such stock into his or their own name or names, otherwise, to the extent and in conformity with the terms the order; and the Bank of England, and all companies nd associations whatever, and all persons, shall be equally ound and compellable to comply with the requisitions of ch person or persons so appointed as aforesaid, to the xtent and in conformity with the terms of such order, as e said Bank of England, or such companies, associations, persons would have been bound and compellable to mply with the requisitions of the person in whose place ch appointment shall have been made.

Indemnity to Bank and Companies so obeying

VII. That every order made or to be made, being or urporting to be made under this or the Trustee Act, 1850, y the Lord Chancellor intrusted as aforesaid, or by the ourt of Chancery, and duly passed and entered, shall be a mplete indemnity to the Bank of England, and all com- anies and associations whatsoever, and all persons, for any ct done pursuant thereto; and it shall not be necessary for e Bank of England, or such company or association, or erson, to inquire concerning the propriety of such order, whether the Lord Chancellor intrusted as aforesaid, or e Court of Chancery, had jurisdiction to make the same.

Power to appoint new trustees in lieu of persons convicted of felony.

VIII. That when any person is or shall be jointly or lely seised or possessed of any lands or entitled to any ock upon any trust, and such person has been or shall be nvicted of felony, it shall be lawful for the Court of Chan- ery, upon proof of such conviction, to appoint any person be a trustee in the place of such convict, and to make an der for vesting such lands, or the right to transfer such ock, and to receive the dividends or income thereof, in such erson to be so appointed trustee; and such order shall ve the same effect as to lands as if the convict trustee had

15 & 16 *Vict. c.* 55, *s.* 9.

been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

Power to the Court to appoint new trustees where there is no existing trustee.

IX. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order.

Chancellor may make orders for appointment of trustees without it being necessary that it should be made in Chancery, &c.

X. In every case in which the Lord Chancellor intrusted as aforesaid has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order, appointing a new trustee or new trustees in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery as well as in Lunacy, or be passed and entered by the registrar of the Court of Chancery.

As to powers of persons intrusted with the care of lunatics.

XI. That all the jurisdiction conferred by this Act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Act to be construed as part of Trustee Act, 1850.

XII. That this Act shall be read and construed according to the definitions and interpretations contained in the 2nd section of the Trustee Act, 1850, and the provisions of the said last mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

All orders made under Trustee Act, 1850, or this Act, to be chargeable with the same stamp duty as deeds of conveyance.

XIII. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

Statutes relating to the Maintenance or Advancement of Infants.

26 *Geo.* 3, *c.* 52.

36 *Geo.* 3, *c.* 52.

An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain cases. [26th April, 1796.]

If by infancy or absence

XXXII. Provided always, and be it further enacted,

at where, by reason of the infancy or absence beyond the as of any person entitled to any legacy or to the residue any personal estate, or any part thereof chargeable with ity by virtue of this Act, the person or persons having or king the burthen of any will or testamentary instrument, the administration of such personal estate, cannot pay ch legacy or some part thereof, although he, she, or they ay have effects for that purpose, or cannot pay the residue some part thereof, although he, she, or they may have e same, or some part thereof, in his, her, or their hands, shall be lawful for such person or persons to pay such gacy or residue, or any parts or part thereof respectively, any sum or sums of money on account thereof, after ducting the duty chargeable thereon, into the Bank of ngland, with the privity of the Accountant General of e Court of Chancery to be placed to the account of the rson or persons for whose benefit the same shall be so id; for payment of which money the said Accountant eneral shall give his certificate, as usual in such cases, on roduction of the certificate of the commissioners of stamps at the duty thereon has been duly paid; and such payent into the bank shall be a sufficient discharge for the oney so paid in, provided the duty be also paid thereon aforesaid; and such money when paid in shall be laid t by the said accountant general without any formal quest for that purpose, in the purchase of £3 per cent. nsolidated annuities, which, with the dividends thereon, all be transferred and paid to the person or persons titled thereto, or otherwise applied for his or their benefit application to the Court of Chancery by petition or otion in a summary way. Provided always, that if it shall terwards appear that such money, or any part thereof, as been improperly paid into the bank as aforesaid, it shall so be lawful for the said Court of Chancery, upon petition, a summary way to dispose thereof, and of the annuities rchased therewith, and the dividends received thereon in ch manner as justice shall require. Provided also, that it shall appear that the duty paid in respect of any such m of money was more than ought to have been paid, it all be lawful for the person or persons, who shall have id such duty, to apply to the said commissioners for anagement of the stamp duties to repay such excess of ty; and the said commissioners are hereby authorised, on such application, to repay such excess of duty to the rson or persons who shall appear to them entitled to ceive the same, or to pay such excess of duty into the nk, with the privity of the accountant general for the nefit of the person or persons entitled, there to be placed the same account and to be applied in the same manner the same would have been applicable if paid together th the remainder of the legacy or sum of money, in spect of which the same shall have been paid; and the

36 *Geo.* 3. *c.* 52, *s.* 32.

legacies cannot be paid, the money may be paid into the bank and laid out in the 3*l.* per cents.

If such money be improperly paid in, the Chancery may dispose thereof.

If more than the proper duty has been paid, the Commissioners for Stamps may return the excess;

36 *Geo.* 3, *c.* 52, *s.* 32.

and if less, on payment of the full duty, the Chancery may order repayment to the party.

said commissioners are hereby authorised to make such payments respectively out of the monies in their hands arising from duties imposed by this Act; and if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the bank as aforesaid upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said commissioners for such duty out of the money in the bank so paid in by such person or persons, or the produce thereof which payment the said Court is hereby authorised to order.

11 *Geo.* 4, *and* 1 *Wm.* 4, *c.* 65.

11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 65.

An Act for Consolidating and Amending the Law relating to Property belonging to Infants, Femes Covert, Idiots, Lunatics and Persons of Unsound Mind.

[3rd July, 1839.]

Court of, Chancery or Exchequer may order dividends of stock belonging to infants to be applied for maintenance.

XXXII. And be it further enacted, that it shall be lawful for the Court of Chancery by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money, by virtue of any Act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person according to the discretion of such Court for the maintenance and education or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

Costs may be directed to be paid.

XXXV. And be it further enacted, that the Court of Chancery or Lord Chancellor, intrusted as aforesaid, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or stock, or the rents or dividends, in respect of which the same respectively shall be made in such manner as the said Court or Lord Chancellor shall think proper.

Powers given to the Court of Chancery in England.

XXXVI. And be it further enacted, that the powers and authorities given by this Act to the Court of Chancery

in England shall extend to all land and stock within any of the dominions, plantations and colonies belonging to his Majesty, except Scotland. 11 *Geo.* 4, *and* 1 *Wm.* 4, *c.* 65, *s.* 36.

XLIV. And be it further enacted, that this Act shall be and is hereby declared to be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies and societies, and their officers and servants, for all acts and things done or permitted to be done pursuant thereto; and that such acts and things shall not be questioned or impeached in any Court of law or equity to their prejudice or detriment. Act to be an indemnity to the bank and other companies.

18 & 19 *Vict. c.* 43.

18 & 19 *Vict. c.* 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage. [2nd July, 1855.]

Whereas great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: For remedy whereof be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant. Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

II. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void. In case infant die under age, appointment, &c., to be void.

III. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian, in a The sanction of the Court of Chancery to

18 & 19 *Vict. c.* 43, *s.* 3.

summary way, without the institution of a suit; and if there be no guardian, the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

be given upon petition.

Not to apply to males under 20 or females under 17 years of age.

IV. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

Statute relating to Partnership.

28 & 29 *Vict. c.* 86.

28 *&* 29 *Vict. c.* 86.

An Act to amend the Law of Partnership.

[5th July, 1865.

Whereas it is expedient to amend the law relating to partnership: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The advance of money on contract to receive a share of profits not to constitute the lender a partner.

I. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

The remuneration of agents, &c., by share of profits not to make them partners.

II. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Certain annuitants not to be deemed partners.

III. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

Receipt of profits in consideration of sale of goodwill not to make the seller a partner.

IV. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

In case of bankruptcy, &c., lender not to rank

V. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for

the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. 28 & 29 *Vict. c.* 86, *s.* 5. with other creditors.

VI. In the construction of this Act, the word "person" shall include a partnership firm, a joint stock Company, and a corporation. Interpretation of "person."

INDEX.

ABANDONMENT,
of excess over £500 to give jurisdiction, 12.
ABATEMENT,
no, of specific legacy, 95.
of general legacies, 95.
what general legacies do not abate, 95.
ACCORD AND SATISFACTION,
defence of, 25.
ACCOUNT,
action of, must be commenced within six years, 315.
title of, where money paid into Court, 268.
ACCOUNTS,
decree as to, at hearing, 33.
direction as to settled, not of course, 34.
distinction between settled, and release, 35.
leave to surcharge and falsify when given, 35.
settled, 33.
inquiry as to, 34.
as defence, 25.
set up by defendant how to be met by plaintiff, 35.
set up by defendant how opened, 14.
when disregarded, 35.
whether must be in writing, 25.
unsettled as defence to administration suit, 60.
vouchers of, lost, how proved, 35.
wilful default must be alleged and proved in plaint seeking an account, when, 14, 57.
ACCOUNTS, INQUIRIES AND DIRECTIONS,
under decree for administration, 86.
when and how obtained, 14.
ACCOUNTANT GENERAL,
not bound to obey orders of County Court, 265.
payment under Trustee Relief Act must be to, 265.
ACCUMULATIONS,
applicable to maintenance of infant, 298.
ACKNOWLEDGMENT,
of account to defeat Statute of Limitations, 315.
of married woman, vesting order to avoid, 280.
ADEMPTION,
of demonstrative legacy, no, 77.
of specific legacy, 77.

ADMINISTRATION,
abatement of general legacies, 95.
no, of specific legacies, 95.
accounts and inquiries under decree for, 86.
advertisements, 87.
annuitant is a legatee, 70.
assets, admission of, in suit for, not advisable, 54.
constructive admission of, 54.
equitable personal, in what order applied, 91.
equitable real, in what order applied, 92.
legal personal, in what order applied, 90.
beneficiaries, at suit of, 97.
claims for debts under decree for, 87.
construction of will when determined in suit for, 72.
costs of suit for, 95, 97. *See* COSTS.
costs of parties served with notice of decree for, 86. *See* ADDENDA.
creditor in equity may institute suit for, 57.
holding security how to institute suit for, 57.
suit, by single, 53.
creditors' suit for, 52.
against real estate, 62.
all persons interested in real estate to be parties, 63.
decree, 66.
defence, 65.
heir when to be a party, 63.
parties, 63.
personal representative to be a defendant, 62.
personal estate must be first administered, 53.
plaintiff to sue on behalf of himself and all other creditors of same degree, 62.
when no personal representative, 62.
creditor claiming in consequence of execution of power, 81.
defence to, 81.
parties to, 81.
form of plaint, 55.
parties to, 55.
plaintiff must prove again before registrar, 87.
debts, how proved under decree for, 87.
decree for, speedily obtained in friendly suit, 97.
cannot be made until personal representative constituted, 55, 69.
form of, in suit by creditor against personal estate, 61.
proceedings under, 85.
defence, 59, 65, 71, 72, 76, 78, 80. *See* DEFENCES.
in suit for, observations as to, 81—84.
special, 82.
set-off, 83.

ADMINISTRATION—*continued.*
Statute of Limitations, 83.
devisee's suit for, 79.
parties to, 80.
defence to, 80.
equitable personal assets, 91.
executor's or administrator's suit, 67.
executor *de son tort*, against, suit for, 55.
forum, 51.
fund paid into Court liable to costs of, 273.
further consideration, 89.
heir at suit of, 68.
form of decree for, at suit of, 70.
heir when entitled to file plaint for, 69.
heirship how proved, 69.
injunction against suit or action against executor after decree, 97.
interest on legacies, 86.
on debts, 88.
on balances in hands of executor, 57.
invalid legacies, 74.
judgment creditors entitled to take property subject to general power of appointment, 81.
judgment creditors, how to proceed when land charged with payment of debts, 92.
jurisdiction of County Court in suits for, 51.
legacies general and specific, 70.
legacy charged on land, suit to recover, 79.
executor and legatee must be defendants, 79.
legatee's suit involves administration, 54.
legatee's suit for, 70.
defence, 72.
marshalling assets, 92.
between creditors, 93.
between creditors and legatees, 93.
no, in favour of charities, 94.
next of kin, suit for, by, 68.
form of decree, 69.
if decided in Court of probate, who are, conclusive, 68.
must file plaint against administrator, 69.
order of applying assets to pay debts, 53.
pecuniary legatee, form of decree for administration at suit of, 74.
form of plaint, 71.
personal representative, at instance of, no suit for, 67.
probate before hearing sufficient in suit for, 55.
receiver appointed before grant of, when, 56.
not appointed as of course, 79.
when against personal representative, 56.
registrar's certificate, 88.
separate certificate for payment into Court, 88.
remedy of simple contract creditor against real estate, 54.

ADMINISTRATION—*continued.*
residuary legatee's suit, 78.
decree, 79.
defence depending upon construction of bequest, 78.
form of plaint, 78.
parties, 78.
retainer, right of, by executor, administrator or trustee, 94.
service of notice of decree for, 85.
specific legatee's suit for, 75.
ademption, 77.
construction of bequest, 76.
decree, 77.
defence, 76.
form of plaint, 76.
set off, 77.
suit for, where to be commenced, 18, 52.
value of estates in suit for, questions as to, 84.
wilful default to be charged in plaint, 57.
See PLAINT, DEFENCE, DECREE, COSTS.
ADVANCEMENT. *See* MAINTENANCE and ADVANCEMENT.
definition of, 301.
jurisdiction of County Court as to, 294.
mode of proceeding, 294.
in what Court, 294.
ADVERTISEMENTS,
in administration suit, 84.
partnership property, of sale of, 327.
AGENCY,
of partners, 305.
AGREEMENTS. *See* SPECIFIC PERFORMANCE OF AGREEMENTS, CANCELLATION OF AGREEMENT.
AMENDMENT,
of plaint, costs of, when leave given to amend, 21.
no, before hearing, 14, 20.
no provision for, in administration suit, 82.
on motion by adding prayer for injunction, 30; or receiver, 15 n.
ANNUITY,
arrears of, do not carry interest, 87.
is a legacy, 70, 74.
APPEAL,
City Court, no, from, 45.
consent, order made by, no, 45.
costs of, 46.
as a rule, no, 41.
exceptions to rule, 41.
decision of Vice Chancellor upon, final, 45.
limitations on power of, do not extend to *certiorari* bill, 45.
mode of, regulated by Ord. xix, 44.
locality, no, as to, 12, 44.

APPEAL—*continued.*
order of transfer to another County Court, no, from, 44.
proceedings not stayed by, 45.
when, will be stayed pending, 45.
staying execution of decree pending, costs of, 43.
Trustee Relief Act under, 269.
value, no, as to, 12, 44.
ASSETS,
equitable personal, how applicable in payment of debts, 91.
equitable real, how applicable in payment of debts, 92.
legal personal, 90.
legal real, 91.
marshalling of, 92-94. *See* MARSHALLING.
partnership. *See* PARTNERSHIP ASSETS.
ASSURANCE OFFICE,
when a trustee, 267.
ASSIGNEES,
of bankrupt partner injunction against, 316.
ARBITRATION,
reference to, by judge, 26.
AUCTION,
See SALES BY ORDER OF COURT.
AWARD,
defence of, 25.

B.

BANKRUPT LAW CONSOLIDATION ACT, 1849.
appointment of new trustee under, 287.
BANKRUPTCY,
annulled, when bankrupt may sue, 158.
assignees upon purchaser's, may repudiate or perform contract, 203.
bankrupt trustee must prove for breach of trust against his own estate in, 126.
creditor's deed, jurisdiction of Court of, over, 106.
mortgaged property when in order and disposition of mortgagor upon his, 163.
notice of defence of, sufficient without pleading, 22, 126.
purchaser under mortgagor's, 163.
registration of creditors' deed in Court of, 106.
trustee, of, cause for removal, when, 116, 287.
BID,
leave to, to partner in suit for winding up, 327.
BILL OF SALES ACT, 148.
BILLS OF EXCHANGE,
drawn &c. by partners, 306.
injunction against partner drawing, negociating &c., 316.
partner paying private debt by, 306.

BREACH OF TRUST. *See* TRUSTEE, TRUSTS.
costs occasioned by, 134. *See* COSTS.
interest of beneficiary concurring in, may be stopped, 122.
one of several persons committing a, can be sued alone when, 122.
BUSINESS,
allowance to executor, no, for carrying on, 324.
allowance to partner for carrying on after dissolution, 324.
injunction against carrying on, 316, 317.
place of, not necessarily partnership assets, 320.
surviving partner may carry on under old firm, 316.
unless restrained by agreement, 317.
where carried on, 304.

C.

CANCELLATION OF AGREEMENTS,
agreement need not be enforceable specifically, 235.
illegal, 237.
not on grounds of public policy not cancelled, 238.
on grounds of public policy, 238.
void at law, rescinded in equity, 234.
collateral fraud, as ground for, 250.
contract seldom set aside for, 251.
post obit bonds, &c., 251.
trust money at bankers, 251.
consequential relief when ground for, 234.
purchaser, having laid out money, 255.
lien of, for deposit, 261.
refusing title after taking possession, 255.
seeking return of deposit, 255.
where contract void at law, 255.
constructive fraud ground for, when, 246.
inadequacy of price, when sufficient ground for, 246.
costs, 261. *See* COSTS.
decree for, account in, 261.
account of purchaser's costs, 261.
allowances in, 261.
form of, 260.
lien for deposit, 261.
wilful default, *quære* as to, 261.
defence to suit for, 256. *See* DEFENCE.
drunkenness when ground for, 239.
equitable defence at law to action on contract excludes, 252.
evidence, 260.
executed by one only of several intended parties, ground for, 238.

CANCELLATION OF AGREEMENTS—*continued.*
foundation of jurisdiction as to, 235.
where consequential relief is sought, 235.
where evidence may be lost, 235.
where plaintiff may be unjustly vexed at law, 235.
fraud, ground for, 239—252. *See* FRAUD.
granted in what cases, 234, 256.
hard bargain, no, on ground only of, 239.
injunction, in suit for, 262.
jurisdiction of County Courts, in suits for, 234, 236.
confined to agreements for sale, 236.
lunacy, no, on ground only of, 239.
misrepresentation, ground for, when, 240, 244.
as to policies for life or marine assurance, 241, 244.
by vendor of estate, 243, 244.
in prospectus of Company, 242, 258. *See* ADDENDA.
remedy in cases of, 243.
when known to be false, 242.
when not known to be false, 242.
mistake, ground for, when, 236.
on both sides, 237.
on one side only, 237.
parties to plaint for, 256.
peculiar to Courts of Equity, 234.
plaint for, form of, 256.
in what Court to be filed, 234.
presumed fraud, when ground for, 248.
contracting parties in confidential relation, 248.
solicitor and client, 248, 259.
trustee and cestui que trust, 249, 259.
vendor and purchaser of reversionary interest, 249.
purchaser, delay of, when ground for, 253.
receiver, in suit for, 262.
relief discretionary when contract void at law, 260.
re-payment of money obtained by fraud, jurisdiction in equity to enforce, 235.
return of deposit or, prayer for, not allowed, 255.
suppressio veri, ground for, when, 244.
by purchaser, 245.
by vendor, 244.
tenant for life, contracting to sell fee, 252.
title, vendor having no, purchaser can sue for, when, 253.
trustees, improper contract by, not rescinded, 251.

CAPITAL,
resorting to, for maintenance, 301.
by trustee, 301.

CAUSE,
transfer of, 10, 19, 23, 47. *See* TRANSFER.

CERTIFICATE,
of registrar. *See* REGISTRAR.
CERTIORARI BILL,
not restricted by limitations on power of appeal, 45.
sustained on grounds of fact, 45.
transfer of cause from County Court by, 10, 23.
of proceedings in City Court by, 45.
CESTUI QUE TRUST,
administration of estate by Court when obtained by, 117.
bound to indemnify trustee against expenses, 132.
entitled to have estate protected, 116.
injunction when obtained by, against trustees, 117.
rescission of contract for sale between trustee and, 249.
release not bound to give trustees, 125, 132.
requiring to use name of trustee, 117.
requiring removal of trustee must do so by plaint, 116.
rights of, against trustee tortiously converting or investing trust property, 110.
where trustee mixes trust monies with his own, 110.
to leaseholds renewed by trustee, 111.
should not be appointed trustee, 101.
suit by, for execution of trusts, 115.
who may be, 101.
CHANCERY, COURT OF,
concurrent jurisdiction of, with County Court, 10.
difference between inherent and statutory powers of, 47.
transfer of cause from County Court to, 10, 147.
when deed on which plaintiff sues is voidable, 25.
CHARGE,
See MORTGAGE.
purchaser of estate subject to, cannot pay into Court under Trustee Relief Act, 267.
CHARGES AND PRETENCES,
when useful in plaint, 14, 24, 35, 160, 205, 256.
CHILD,
of partner, receiving an annuity, not a partner, 304.
CITY COURT,
no appeal from, 45.
removal of proceedings from, by *certiorari* bill, 45.
CLERK,
sharing profits, not necessarily partner, 304.
COMMITTAL,
for contempt, order of County Court for, 357.
power of County Court to order, 355, 357.
proceedings on, in Chancery, 355.
warrant of Lord Chancellor for, 356.
of County Court for, 357.
CONSIDERATION,
failure of, when ground for cancelling agreement, 238.
unnecessary to support trust, 100.

CONSTRUCTION,
questions of, in suits for administration when determined at hearing, 71, 78, 80.
when reserved to further consideration, 72.
in suits for execution of trusts determined at hearing when, 102.
CONSTRUCTIVE TRUSTEE,
within Trustee Acts, 279.
CONTEMPT,
committal for, power of County Court, 355. *See* INJUNCTION.
order of, 357.
warrant of, by Lord Chancellor, 356.
warrant of, by County Court, 357.
disturbing receiver, a, 28.
marrying ward, a, 296.
process of, 355.
taking ward abroad, a, 296.
CONVERSATIONS,
how pleaded, 13.
CONVEYANCING COUNSEL,
conveyance when to be settled by, 227.
registrar may obtain opinion of, upon inquiry as to title, 221.
CO-OWNERS,
are not co-partners, 305.
though sharing rents, &c., 305.
may be partners, in produce only, 322.
except where land accessory to a business, 322.
not mutual agents, 306.
one alone may give receipts for rent, &c., 307.
COPYHOLDS,
order for vesting, 284.
lord's consent how proved, 284.
whether vesting order of will be made without lord's consent, 284. See ADDENDA.
COSTS, *generally*.
amendment, upon, 21.
alteration of law, pending suit, effect of, upon, 41.
appeal, of, appellant partially successful, 46.
as a rule, no, 41.
exceptions to rule, 41.
out of fund, where real difficulty of construction, 46.
when payable by appellant or respondent personally follow the result, 46.
contentious cases, in, generally follow event, 38.
discharge of injunction *ultra vires*, of, 334.
disclaiming defendant, of, 42.
effect of offer or tender to plaintiff upon, 39.
equity, in, are in discretion of Court, 38.
follow the event in absence of express direction, when, 38.

COSTS—*continued.*
fraud charged but not proved, of, 39.
further consideration generally not disposed of till, 43.
issues, of, 42.
laches of plaintiff, effect of, upon, 40.
in family suits, 40.
motion, of, 42.
stranger moving, 43.
to stay proceedings pending appeal, 43.
payment of, whether can be enforced by judgment debtor summons, 44.
petition, of respondents to, 274.
plaintiff successful to pay, when, 40.
unsuccessful to receive, when, 41.
procedure, when mode of unnecessarily expensive, 40.
purchaser, of, on sales by order of Court where title bad, 37.
reserved, 43.
without express mention where further consideration adjourned, 43.
revivor for, as a rule there is no, 41.
exceptions to rule, 41.
sale to raise, within Trustee Extension Act, 284.
security for, 20.
by next friend of married woman, 369.
order for, 335.
where plaintiff abroad, 335, *note.*
an alien, 335, *note.*
solicitor, ordered to be paid to, when paid out of fund in Court, 41.
standing over, of, to supply deficient proof at hearing, 33, 43.
suit, of, include costs after hearing, 43.

In administration suits, 95-97.
assets being deficient plaintiff gets as between solicitor and client, 96.
assets sufficient plaintiff gets as between party and party, 96.
claimant failing pays when construction of will is decided, 96.
informed no assets pays, 36.
creditor's, of proving debt, 97.
general personalty primarily liable to, 95.
next of kin no more liable to pay than residuary legatees, 96.
parties, of, served with notice of decree for administration, 86. *See* ADDENDA.
personal estate pays of construction as to real estate, 97.
representative entitled to in priority to plaintiff, 96.
gets as between solicitor and client, 96.
plaintiff generally gets as between party and party, 96.

COSTS—*continued.*
plaintiff realizing fund, of which he gets no portion, gets as between party and party, 96.
second suit, of, when paid out of assets, 97.
testator creating fund for payment of debts and legacies, paid out of that fund, 97.

In suits for cancellation of agreements, 261.
dismissed on ground of delay, 261.
follow result generally, 261.
fraud, alleged and disproved, plaint dismissed with, 261.
purchaser's, account of, taken, 261.

In suits for execution of trusts, 133—138.
apportionment of costs, 134, 138.
Court not disposed to make nice distinctions in, 138.
quasi-trustee, of, 137.
trustee disclaiming, of, 137.
entitled to, as between solicitor and client and to charges and expenses, out of fund, 133.
exceptions, 133.
apportionment of costs in cases of breach of trust, 134.
fraud, 134.
inquiry as to breach of trust, 134.
suit to repair breach of trust, 134.
has lien on trust fund for costs, charges and expenses, 137.
but not his solicitor, 137.
inquiry as to extra costs of, sometimes inserted, 137.
not deprived of costs for mere negligence, 135.
occasioning suit by his conduct, 135.
quasi-trustee, of, 137.
refusing to retire, 136.
representative of deceased, entitled to full costs out of fund, 137.
retiring without sufficient cause, 136.
setting up adverse claim, 138.
severing, one set of costs only allowed, 136.

In suits for foreclosure or redemption.
affidavit as to deeds, of, 186.
appeal, of, 184.
defendant, of making holder of legal estate, a, 152.
defendant, of, out of purchase money, 186.
devisee of legal estate, of, 155.
enlarging time, of application for, 186.
heir holding legal estate, of, 155.
loss of deeds, mortgagee must pay costs occasioned by, when, 184.
mortgagee generally entitled to add costs of suit to debt, 183.
exceptions to rule, 183.

COSTS—*continued.*
parties, of, rendered necessary by settlement of mortgage debt, 153.
remaindermen in equity of redemption, of, in tenant for life's suit, 157.
reconveyance, of, 184.
sub-mortgagee's, 153.
taxed as between solicitor and client, 184.
tenant for life, of, dying before hearing, 157.
transfer, of, 152.
unreasonable disposition of mortgaged estates, of, 154.

In partnership suits, 329—331.
dissolution of partnership, of suit for, 312, 329.
dissolution on ground of lunacy, of, 331.
winding-up, of, 330.

In suits for specific performance, 230—233.
occasioned by death of vendor leaving infant heir or devisee, 231.
plaint dismissed without, when, 231.
by purchaser, where title is bad, 232.
praying compensation, which is not given, 231.
successful, of, when no costs given, 231.
question one of contract, 231.
one of title, 232.
time of showing title, 232.
title bad, 232.
title doubtful, 232.

In proceedings under Trustee Acts, 293.
how far allowed, 293.
out of what fund, 293.
respondent cannot be made to pay, 293.
where petitioner has only a partial interest, 293.

In proceedings under Trustee Relief Act, 271—274.
trustee appearing when allowed, 272.
disallowed, 272.
made to pay, 271, but see 273.
trustee's, of payment in, 273.
what fund bears, 273.
where respondent's claim fails, 274.
where tenant for life petitions, 273.
CO-TRUSTEES,
one may receive rents, dividends, &c., 307.
COUNTY COURT,
concurrent jurisdiction of, in matters of equity with the Court of Chancery, 10.
practice of, how far governed by general orders of Court of Chancery, 10.
proceedings to be taken in what, 18.
COVERTURE,
notice of defence of, sufficient without pleading, 22.

CREDITORS. *See* ADMINISTRATION.
CREDITORS' DEED, 104.
constructive execution of, by creditors, 105.
form of plaint by creditor under, 105.
jurisdiction in bankruptcy and County Court over, 106.
registration under Bankruptcy Act, 1861, 106.
release of debtor under, when implied, 106.
trust for creditors when revocable, 105.
when not, 105.
when act of bankruptcy, 106.
CROSS-BILL,
cannot be filed in County Court, when, 25, 160.

D.

DAMAGES,
equity, power of a Court of, to give, 197, 207.
specific performance or, prayer for, when not allowed, 255.
sufficient compensation for breach, contract not enforced, 195.
undertaking as to, on ex parte order should extend to costs, 334.
on interim injunction, 30.
where vendor cannot make a title, 196.
DAY TO SHEW CAUSE,
not given where order made under Trustee Act, 284.
DECREE,
at hearing, 33.
for accounts, 33.
carried into effect under Trustee Act, 284.
defence of former, 26.
enforcement of, 45, 355.
foreign when disregarded, 26.
made by consent, no appeal from, 45.

In administration suits.
cannot be made until a personal representative is constituted, 55, 69.
form of, in suit by creditors against personal estate, 60.
real estate, 66.
by next of kin, 69.
by pecuniary legatee, 74.
by specific legatee, 79.
when persons interested in realty are parties, 975.
proceedings under, 85, 8.

In suits for cancellation of agreements.
accounts ordered by, 261.
of purchaser's costs ordered by, 261.
whether taken with wilful default, 261.

DECREE—*continued.*
allowances, ordered by, 261.
form of, 260.
lien for deposit, as to, 261.

In suits for execution of trusts, 128.
constructive trust, in case of, 129.
defendants having taken trust property with notice, against, 128.
suit simply to execute trusts, 128.
suit to repair breach of trust, 129.
when defendant declared a trustee of renewed leaseholds, 129.
with indemnity against covenants and wilful default, 129.

In foreclosure and redemption suits.
at hearing, 167, 172.
form of, first mortgagee v. second mortgagee and mortgagor, 174.
mortgagee's executor v. mortgagor and heir of mortgagee, 168.
foreclosure for, against surety for mortgagor, 150, 172.
in case of equitable mortgage by deposit, 170.
infant defendant, when made absolute, against, 170.
rents and profits received by mortgagee, as to, 167.
sale, when ordered by, 170.
conduct of, given to first mortgagee, 171.
deposit upon, 171.
reserved bidding upon, 171.
where defendant an infant, must be for his benefit, 171.
sale for, at instance of mortgagee, 171.
sale for, at instance of mortgagor, 171.
sale for, to raise a charge, 172.
sketch of, when equity of redemption is mortgaged or incumbered, 172.
sub-mortgagee, at instance of, 172.
when taken with rests, 167.
when heir of mortgagee is an infant, 169.

In partnership suits.
at hearing, 318.
form of, where partnership dissolved on ground of fraud, 313.

In suits for specific performance.
final, 224.
form of, when no inquiry as to title, 224.
when purchaser plaintiff, 225.
special directions or inquiries under, 225.
compensation, inquiry as to, 227.
interest, 226. *See* INTEREST.
inquiry as to title, 220.
when restricted, 220.

DEEDS,
affidavit of mortgagee as to, 186.
costs of, 186.
delivery up of, in suit for specific performance, 227.
leaving, in hands of mortgagor will postpone prior mortgagee, when, 163.
loss of by mortgagee, effect of, 184.

DEFENCE, *generally*, 24—27.
accord and satisfaction, 25.
award, 26.
deed on which plaintiff sues is voidable, no, 24.
former decree, 25.
notice of special, sufficient without pleading, 22, 59, 72.
release, 24.
settled account, 25.
want of jurisdiction, 24.
In administration suits.
by creditor, 59.
payment to creditors of a lower degree without notice, 59.
to beneficiaries when good, 60.
plenè administravit, 59.
statute of limitations, 59.
unsettled account, 60.
to creditor's suit against real estate for administration, 65.
statute of limitations, 65.
to creditors claiming in consequence of execution of a power, 81.
to devisee's suit, 80.
general observations as to, 81—84.
to pecuniary legatee's suit for administration, 72.
legacy invalid, 74.
satisfaction, 73.
set-off, 73.
statute of limitations, 72.
time for payment not arrived, 73.
to specific legatee's suit for administration, 76.
ademption, 77.
not applicable to demonstrative legacy, 77.
set-off, no, 77.

In suits for cancellation of agreement, 256—260.
knowledge by purchaser of incorrectness of misstatement, 256.
laches of plaintiff, 259.
plaintiff has good defence at law, when a, 256.
has tested statements of defendant, 257.
time bargain, that contract was a, 258.
voidable contract, confirmation of, when a, 257.
restitutio in integrum impossible by act of plaintiff, 257.

DEFENCE—*continued.*
waiver of misrepresentation, &c., 257.

In suits for execution of trusts, 123—126.
bankruptcy, 126.
concerning *choses in action*, 125.
lapse of time bar to constructive but not to direct trust, 123.
purchase without notice, 126.
release, 125.
regarded with suspicion when, 125.
statute of limitations, 124.
should be raised by notice, 124.
time begins to run in cases of fraud when, 124.
waiver and acquiescence, 125.

In suits for foreclosure or redemption, 159—166.
foreclosure suit between original mortgagor and mortgagee, 159.
decree in former suit, 160.
of foreign Court, 160.
mortgage void or voidable for fraud cannot be raised, 160.
release, payment or tender, 159.
to be pleaded, 159.
statute of limitations, 159.
time begins to run when, 159.
time once begun to run not suspended, 160.
to be raised by statement or notice, 160.
redemption suit between original mortgagor and mortgagee, 160.
decree in former suit for foreclosure, 161.
when opened, 161.
release or sale of equity of redemption by mortgagor to mortgagee, 160.
sale of equity of redemption to mortgagee subject to right of repurchase, 160.
statute of limitations, 161.
acknowledgment excluding statute, 162.
acknowledgment of one of several co-mortgagees, 161.
acknowledgment to one of several co-mortgagors, 161.
disability of mortgagor, whether prevents running of, 162.
does not apply to chattels, 162.
mortgagor barred by twenty years possession of mortgage, unless acknowledgment, 161.
to be pleaded or notice given of setting up, 162.
time begins to run when, 162.
foreclosure and redemption, in, peculiar to persons claiming under mortgagor, 162.

DEFENCE—*continued.*
lease under power in mortgage deed, 162.
leaving title deeds in hands of mortgagor when valid, 163.
legal estate got in by subsequent mortgagee when valid, 164.
mortgage concealed through mortgagee's laches, 163.
notice of assignment of *chose in action* to be given to debtor, 163.
property in order and disposition of mortgagor, 163.
stop order to be obtained on fund in Court, 163.
foreclosure and redemption, in, peculiar to persons claiming under mortgagee, 164.
depreciatory conditions what may be inserted in conditions of sale under power, 165.
power of sale now incident to every mortgage, 164.
inherent in mortgage of stock and chattels, 166.
improperly exercised, time no bar to redemption, 165.
purchase money allowed to remain on mortgage, 165.
purchase under, 164.
sale under, may be by private contract, when, 165.
sale under, cannot be made pending suit, 166.
sale under, cannot be made after tender of principal, interest, and costs, 166.
second mortgagee may purchase under, in first mortgage, 165.
purchase without notice, 164.

In partnership suits.
denial of partnership, 315.
statute of limitations, 315.

In suits for specific performance, 208—219.
consideration partly illegal, 217.
contract impossible to be performed *in toto*, 216.
depreciatory conditions by fiduciary vendors, 207.
good title not shown, 217.
question as to, sometimes raised on pleadings, 218.
reference as to title, 217.
hard bargain, 212.
good against performance with compensation, 213.
puffers not allowed unless stated, 214.
purchaser buying up outstanding interest, 213.
purchaser knowing defect at time of contract, 213.
special conditions, 214.
vendor discovering defect after contract, 213.

DEFENCE—*continued.*
illegal contract, 216.
informal contract must contain all essential terms, 209.
laches of plaintiff, 215.
where time of essence of contract, 215.
misrepresentation, 214.
when amounts to fraud, 214.
when not amounts to fraud, 215.
mistake, 212.
special, 219.
bankruptcy, 219.
infancy, 219.
statute of frauds as to interest in land, 208.
agreement cannot be divided, 209.
contracts which are not within, 211.
interest in land, what is, 208.
note or memorandum of agreement sufficient, 209.
part performance takes case out of, when, 210.
acts of, must refer to contract, 211.
principle of Court as to, 210.
terms of agreement must appear by, 211.
to be pleaded, 208.
signature of agreement what sufficient, 210.
title bad, 218.
doubtful, 218.
voluntary settlor, that vendor is, 217.
written agreement, defendant may set up parol variation of, 212.
DEFENDANT'S STATEMENT, 21.
special defences if notice given, sufficient without their being contained in statement, 22.
time for putting in, 22.
DISABILITY,
person under, order devesting estate from, 284.
form of order, 285.
DISCLAIMER,
costs of, by defendant, 42.
estate, of, by trustee, 112.
estate, of, by *feme coverte*, 113.
heir-at-law cannot disclaim, 82, 113.
heir-at-law, by, in administration suit, 82.
next of kin, by, in administration suit, 82.
office, of, by trustee, 112.
trustee, by, makes heir a trustee, 280.
DISCOVERY,
after decree, 36.
no, before hearing from defendant, 22.
from plaintiff, 23.
as to other incumbrances in suit for foreclosure or redemption, 149.
DISSOLUTION OF PARTNERSHIP. *See* PARTNERSHIP.

DISTRICT,
in which plaint must be filed, 12.
judge need not be within, to make valid orders, 11.
DOCUMENTS,
affidavit as to, no, before hearing, 23.
discovery as to, after decree, 36.
privileged, 23.
how protected, 36.
production of what, can be enforced at hearing, 23.
proof of, 33.
what need not be produced at registrar's office, 36.
DONATIO MORTIS CAUSA,
by delivery of mortgage deed, 153.
DRUNKENNESS,
ground for cancelling agreement when, 239.

E.

ELECTION BETWEEN LAW AND EQUITY,
when ordered, 334.
order for, form of, 335.
EQUITY TO A SETTLEMENT,
barred by adequate settlement on marriage, 360.
children, rights of, 360.
none where wife dies before decree, 360.
consent to, solvent husband refusing, 360.
fund less than 200*l.*, of, may be claimed, 361.
how much settled, 360.
infant cannot waive, 359. *See* Order xvii. r. 8.
life estate, of, 361.
nature of settlement, 360.
no, when money paid to husband before suit, 359.
or during suit dismissed before hearing, 360.
origin of, 359.
personal estate, of, 359.
real estate, of, 361.
small fund, of, how effected, 360.
trustee may pay into Court in order to enforce, 272.
waived, how, 360.
may be, by wife until settlement executed, 360.
wife may assert actively as plaintiff, 359.
EVIDENCE,
account books are primâ facie, 36.
at hearing, 32.
in suits for execution of trusts, 128.
when special accounts &c. are asked for, 32.
cancellation of agreements, in suits for, 260.
creditors' deed must be registered to be, 106.
deposit of deeds, whether by way of mortgage, 143.
extrinsic, admissible to prove conveyance is a mortgage, 142.
not after long time, 142.

EVIDENCE—*continued.*
foreclosure and redemption, suits in, at hearing, 166.
necessary to obtain final decree, 185.
proving mortgage deed, 166.
to ground inquiries, 166, 167.
on motion ex parte for injunction, 30.
parol, admissible as to vendors' lien, 146.
parol or slight, admissible as to further advances, 143.
parol, not admissible at law as to written agreement, 194.
parol, rebutting resulting trust, 107, 108, 109.
proving documents, 33.
specific performance, in suits for, 219.
parol when admissible, 220.
increased by Sir Hugh Cairns' Act, 220.
supplying deficient proofs as to documents, 33.
when vouchers lost, 35.
EXECUTION,
process of, 355, 356.
EXECUTOR AND ADMINISTRATOR. *See* ADMINISTRATION.
cannot institute suit for administration, 69.
EXECUTOR,
of partner, carrying on business, 324.
de son tort, remedies against, at suit of creditors, 53.
EXPARTE APPLICATIONS. *See* INJUNCTION.
other than injunctions, 31.

F.

FILING AND SERVICE,
of plaint, 19.
FORECLOSURE AND REDEMPTION. *See* MORTGAGES.
allowance to mortgagee, no, for trouble in collecting rents, 181.
alternative prayer for foreclosure or sale, 149.
bailiff, mortgagee allowed expense of, when, 181.
bankrupt or insolvent when entitled to sue for, 158.
charges, remedy by sale, 141.
co-mortgagees must be parties to suit for, 150.
co-mortgagors, one of several, can file bill for redemption, 149.
consolidation in suits for, 178.
exists only for benefit of mortgagee, 179.
costs of suit, 183. *See* COSTS.
of affidavit as to title deeds, 189.
of making holder of legal estate defendant, 152.
of parties rendered necessary by mortgagees settlement of debt, 153.
Court in which proceedings are to be taken, 139.

FORECLOSURE AND REDEMPTION—*continued.*
decree at hearing, 167—175. *See* DECREE.
defences to suit for, 159—166. *See* DEFENCES.
discovery of other incumbrances before hearing cannot be obtained, 149.
course to be pursued upon, 149.
dismissal of bill for redemption equivalent to foreclosure against plaintiff, 185.
dowress of equity of redemption may redeem, 157.
enlarging time on motion in foreclosure suit, 184.
rarely in redemption suit, 184.
after final decree, 186.
costs of application for, 184.
when security is scanty, 184.
equitable mortgages, 141.
equitable mortgagee entitled to decree for legal mortgage, 186.
evidence at hearing for plaintiff, 166.
necessary to ground inquiry, 166.
proving mortgage deed, 166.
for defendant, 166.
necessary to ground inquiry, 167.
necessary to obtain final decree, 185.
final decree in, 185.
foreclosure, cannot be obtained, one of several co-mortgagors being abroad, 150.
infant in case of, when absolute in first instance, 170.
opening of, 186.
opened by mortgagee suing at law after final decree, 161.
remedy in case of equitable mortgage, 170.
heir-at-law or devisee of deceased mortgagee to be a party to, 155.
redeeming must pay twenty years arrears of interest on covenant, 178.
injunction against mortgagee cutting timber, 333.
selling, 332.
suing at law, 186.
against mortgagor cutting timber, 333.
inquiry as to amount of principal due, when, 179.
as to incumbrances, whether will be granted, 149.
interest on mortgage debt, 179—181. *See* INTEREST.
judgment being a charge on property, remedy for, foreclosure, 144.
jurisdiction of County Court in suits for, 139.
liens, jurisdiction of equity in cases of, 141.
mortgagee, having assigned debt and estate, not a proper party to suit, 151.
mortgagee in possession allowed expenses of renewing lease, 181.
allowed for repairs, 181.

FORECLOSURE AND REDEMPTION—*continued.*
charged with deterioration of estate, when, 182.
felling timber or opening mines, 182, 333.
improvements made by, mode of valuing, 182.
improvements made by, inquiry as to, when made, 182.
inquiry as to fact of possession, 181.
interest on outlay by, 182.
may not improve mortgagee out of his estate, 182.
occupation rent charged against, when, 181.
premiums on fire policy, when allowed to, 182.
rests, when ordered against, 181.
wilful default against, 181.
may add all costs, charges and expense incurred to security, 182.
receiving rent after certificate, new day for redemption appointed, 185.
mortgages in fee or for a term, 140.
of an equity, 141.
mortgagor not necessary party to suit for, between original mortgagee and submortgagee, 153.
nature and origin of jurisdiction in suits for, 140.
personal representative of mortgagor, when necessary party to suit for, 158.
plaint for, 148.
by equitable mortgagee, 149.
title deeds, prayer for delivery up of, in, 149.
pleading conversations in suit for, 149.
proceedings under the decree, 179—188.
real estate of married woman, plaint for, of, 149.
receiver, 186. *See* RECEIVER.
registrar's office closed on the day appointed for payment, effect of, 185.
sale, conduct of, given to first mortgagee, 171.
costs of defendant after, 186.
deposit upon, 171.
form of decree for, at instance of mortgagor, 171.
to raise a charge, 172.
reserved bidding upon, 171.
rights of parties after, 186.
where defendant an infant, must be for his benefit, 176.
second or third incumbrancer must make subsequent incumbrancers parties to suit for, 158.
submortgagees, form of decree at instance of, 172.
necessary parties to suit for, 153.
surety for mortgagor, form of decree for foreclosure against, 151, 172.
when to be a party to suit for, 151.
tacking of mortgages in suits for, 175—178. *See* MORTGAGE.

FORECLOSURE AND REDEMPTION—*continued.*
tenant by curtesy may redeem, 157.
tenant for life and remainderman in equity of redemption, relative rights of, 156.
trustees of mortgage debt settled, only proper parties when, 157.
wife, separate estate of, mortgaged to secure certain sum and further advances, 151.
surety for husband as to her real estate mortgaged to secure husband's debt, 150.
not when husband and wife exercise a joint power of appointment, 151.
FRAUD,
actual, 240.
as defence to suit for specific performance, 214.
collateral, 250.
contract rarely set aside for, 251.
marital rights, fraud on, 250.
post obit bonds, &c., 251.
trust money at bankers, 251.
constructive, 246.
inadequacy of price alone insufficient, 246.
when sufficient, 246.
inadequacy of price and advantage taken of necessity of vendor, 247.
costs of unsustained charges of, borne by party alleging, 39, 261.
difference between, in equity and at law, 240, 247.
different kinds of, 240.
misrepresentation, when amounting to, 214, 240.
as to policies of life and marine insurance, 241, 244.
by vendor as to property, 243, 244.
in prospectus of Company, 242.
remedy in cases of, 243.
when known to be false, 242.
when not known to be false, 242.
must be pleaded specifically, 13, 24.
must be pleaded, to impeach release, 24.
presumed, 248
contracting parties in confidential relation, 240.
solicitor and client, 248.
trustee and cestui que trust, 249.
vendor and purchaser of reversionary interest, 249.
rebutted on sale by auction, 250.
repayment of money obtained by, jurisdiction in equity as to, 234.
suppressio veri, 244.
by purchaser, 245.
by vendor, 244.
FUND,
aliquot shares of, payment into Court of, 268.
settled, trustee may pay into Court, 272.

FURTHER CONSIDERATION,
administration suit, in, 89.
construction, questions of, when reserved till, 72.
execution of trusts, in suits for, 133.

G.

GENERAL ORDERS,
of Court of Chancery, how far applicable to the practice of County Court, 10.
GUARDIAN,
infant may be removed from, 295.
of ward of Court, 295.
GUARDIAN AD LITEM,
how appointed, 271.
GOODWILL,
assets of partnership, 327.
vendor of, receiving share of profits not a partner, 305.

H.

HEARING,
amendment of plaint, no, before, 14, 20.
construction, questions of, in suit for administration, when decided at, 71, 78, 80.
in suit for execution of trust decided at, 102.
decree at, 33.
discovery from defendant, no, before, 22.
from plaintiff, no, before, 23.
no, as to other incumbrances in foreclosure and redemption suits before, 149.
documents, what produced at, 23.
evidence at, 32. *See* EVIDENCE.
special defences must be made at, 84.
HEIR AT LAW,
administration suit by, 68, 69.
cannot disclaim, 82.
decree for administration, form of, at suit of, 70.
entitled to file plaint for administration when, 69.
redeeming, to pay twenty years arrears of interest due on covenant, 178.
redemption or foreclosure to be party to, 155.
HUSBAND AND WIFE,
change in devolution of equity of redemption of wife's real estate, when effected by mortgage, 155.
fraud on marital rights, 250.
husband must be a party to a suit by wife with respect to her separate property, 74, 369. *See* MARRIED WOMAN.
legatee a married woman, husband must be a co-plaintiff, 74.

HUSBAND AND WIFE—*continued.*
legatee a married woman entitled to her separate use must sue by next friend, 74.
married woman, how and when able to contract, 191.
mortgage of wife's real estate for husband's debt surety only, 150.
mortgage of wife's separate estate for sum and further advances, 151.
next of kin a married woman, husband must be co-plaintiff, 68.
wife by next friend and husband co-plaintiffs for redemption of her mortgaged real estate, 149.

I.

INCUMBRANCES. *See* MORTGAGES, FORECLOSURE AND REDEMPTION.
inquiry as to priorities of, upon sale by Court, 36.
ILLEGALITY,
of partnership, 317, 323.
INFANCY,
notice of defence of, sufficient without pleading, 22.
INFANT,
estate of, devested under Trustee Act, 284.
party to suit or proceeding in Chancery, ward of Court, 295.
for winding up partnership, 329.
petition under Trustee Acts, may, 291.
power of, to make settlement on marriage, 297, 302.
served with decree in Chancery ward of Court, 295.
service of petition upon, 271.
specific performance of agreement cannot enforce, 191.
whether in any case ward of County Court, 295. *See* WARD OF COURT.
INJUNCTION,
administration suit of real estate when granted in, 65.
against suit or action, after decree for administration, 97.
against partners. *See* WINDING-UP.
against trustee selling, 332.
breach of, 356.
order of committal, 357.
warrant of committal, 357.
by Lord Chancellor, 356.
cancellation of agreements, in suit for, for preserving property, 117.
effect of, in other Courts, 333.
execution of trusts, in suit for, when obtained, against trustee, 129.
ex parte, evidence on motion for, 30.
interim order in lieu of, 333.
service of, 333.

INJUNCTION—*continued.*
ex parte, when and how obtained, 30.
frame of plaint, seeking, 15, 29.
jurisdiction of County Court to commit for breach of, 356.
to issue, 332.
mortgagee, against, cutting timber, 333.
selling, 332.
suing at law, 186.
mortgagor, against, cutting timber, 333.
must be prayed for, 29.
notice of application for, 30, 333.
plaint seeking an ex parte, to disclose all facts known to plaintiff, 16.
specific performance, in, restraining action for deposit or expenses, 229.
special for preservation of property, 229.
undertaking on granting an interim, 30.
ultra vires, 334.
discharged, costs of, 334.
INQUIRIES,
under Trustee Relief Act, 269, 271.
INSANITY,
of partner, 308, 311. *See* LUNACY.
INSURANCE,
policy of, set aside for misrepresentation, 241, 244.
INTEREST,
balances, on, in hands of executor, 57.
capitalization of, 181.
contingent legacy to infant, on, 87, 302.
judgments, on, at 4 per cent., 180.
legacies, on, during executor's year, 119.
specific, 86.
mortgages, in, where no rate reserved at 4 per cent., 179.
by deposit, whether allowed, 179.
not charged on funds not come to hand, 131.
partner, when entitled to, 324.
when liable to pay, 324.
proviso for raising or lowering in mortgage, 180.
purchase money, upon, unpaid, 226.
effect of conditions, as to, 226.
purchase money lying idle, 226.
statute of limitations, as to, on mortgage debt, 180.
acknowledgment by mortgagor of no avail against puisne mortgagee, 280.
where more than six years arrears recoverable, 180.
trustee, bound to accumulate, charged with compound interest, 131.
committing breach of trust, charged with 5 per cent., 130.
investing money in trade charged with profits or interest at 5 per cent., 130.

INTEREST—*continued.*
retaining balances charged with 4 per cent., 130.
trader, paying money to general account charged with profits, or interest at 5 per cent., 130.
INTERIM ORDER, 333.
service of, 333.
INTERLOCUTORY APPLICATION,
deposit of jewels, deeds, &c., for, with registrar, 28.
execution of trusts, in suits for, 127.
parties interested in money paid in on, to be represented, 27.
payment of money into Court, for, made on defendant's admission, 27.
plaintiff may move for payment into Court on possible title, 27.
INVESTMENTS,
money, of, in County Court to be in name of treasurer and registrar, 120.
trust moneys, of, former rule as to, 120.
present rules as to, 120.
ISSUES,
costs of, 42.

J.

JOINT ESTATE,
constructive, 322.
conversion of, after dissolution of partnership, 321.
conversion of, into separate estate, 319, 322.
where partner carries on independent business, 322.
conversion of separate estate into, 319, 322.
where presumed, 319.
definition of, 319.
followed, cannot be, *semble*, 320.
land given together with business, 322.
lease, renewed by one partner, is, 323.
master and part owner of ship trading on his own account, 323.
misappropriated by partner, 320.
place of business, whether is, 320.
profits obtained by one partner, *malâ fide*, are, 322.
of solicitor, 323.
property purchased with partnership money, &c., is, 319.
unless money lent to partner, 319.
stock in trade, &c., purchased by one partner alone, 320.
JURISDICTION OF COUNTY COURT,
administration of assets, within, 51. *See also* ADMINISTRATION.
breach of injunction, to commit for, 356.

JURISDICTION OF COUNTY COURT—*continued.*
cancellation of agreements within, 234. *See also* CANCELLATION OF AGREEMENTS.
creditors' deeds, over, extended to £500, 106.
execution of trusts, suits for, within, 98. *See* TRUSTS, TRUSTEE.
extended by abandonment of excess over £500, 12.
extended by want of objection of either party, 12.
foreclosure and redemption, in suits for, 139. *See also* FORECLOSURE AND REDEMPTION.
infants, as to, 295.
where parties in partnership suits, 329.
lunacy, in, no, 279.
maintenance and advancement, in proceedings for, 294.
maintenance and advancement of infant having fund in Court and other property, to make order for, 48, 297.
objection to, for excess of value, 24.
partnership, in suits relating to, 303. *See also* PARTNERSHIP.
power to set aside deed not within, 25, 160.
specific performance, in suits for, 189. *See also* SPECIFIC PERFORMANCE.
value and locality, as to, confined by ss. 2 & 10 of Act, 12.
judgment not liable to appeal, 12, 44.
to be stated in plaint, 16.
JURISDICTION OF COURT OF PROBATE,
to conclusively determine next of kin, 68.
to determine construction of will, no, 76.
JOINT PURCHASERS,
not partners, 305.
JOINT STOCK COMPANY,
not possible at common law, 307.
JOINT TENANTS,
not partners, 305.
JUDGE,
power of, to make orders out of district to which cause belongs, 11.
powers of, upon sales by order of Court, 37.
JUDGMENT,
accounts and inquiries referred to in 27 & 28 Vict. c. 112, s. 4, must be prayed for, 145.
Acts creating, a charge on real estate, 143.
charge of, to what property extends, 144.
creditor entitled to take in execution property over which a debtor has a general power of appointment, 81.
creditor not deprived of priority by devise for payment of debts, 92.
creditor not entitled to tack by getting in first mortgage, 177.
debt, interest on at 4 per cent., 180.

JUDGMENT—*continued.*
foreclosure, proper remedy of person having a, 144.
less than £500, remedy for, is in County Court, 145.
mortgagee, first, entitled to tack money advanced on, 176.
probate, order of Court of, not a charge on land, 144.
registration of, 144.
under 27 & 28 Vict. c. 112, does not apply to charge on equity of redemption, 145.
LANCASTER,
Court of Chancery of, jurisdiction of, under Trustee Relief Act, 265.
LEASEHOLDS,
vesting order as to, 281, 288.
LEGACY,
ademption of specific, 77.
demonstrative, no, 77.
annuity is a, 70, 74.
charitable institution, to, 74.
construction of, how determined, 74.
demonstrative, defined, 77.
general, defined, 71.
interest where a contingent, given to infant, 227, 30.
invalid, 74.
married woman, to, husband must be co-plaintiff, 74.
for separate use must be sued for by next friend, 74.
satisfaction of, by advancement, 73.
set-off against, 73.
specific, no, 77.
specific, defined, 71.
time for payment of, 73.
widow, to, in lieu of dower, entitled to priority, 74.
LEGACY DUTIES ACT, 265.
LEGAL ESTATE,
partners enjoined from setting up, 316.
held trustees of, 320.
LETTERS,
constituting agreement how pleaded, 13.
LIEN,
See MORTGAGE.
purchaser's, for deposit, 261.
LIMITED LIABILITY,
no, at common law, 307.
LOCKE KING'S ACT, 158.
LUNACY,
County Court has no jurisdiction in, 279.
partner, of, 308.
costs where partnerships dissolved, on ground of, 331.
party to suit for winding-up partnership, of, 329.
specific performance, good defence to suit for, 191.
setting aside fair agreement, no reason for, 239.

LUNACY—*continued.*
trustee, of, 287.
under some other disability, 287.

M.

MAINTENANCE,
amount allowed, 298, 300, 301.
where there are other children, 301.
father must provide, if of ability, 300, but see p. 209.
notwithstanding express provision for, 300.
unless entitled to, by contract, 300.
mother not bound to provide, 300.
out of capital, when, 301.
out of stock, 299.
out of what property, 297, 299.
past, how far allowed, 301.
inquiry, as to, 298.
not generally allowed to father, 301.
where gift contingent, 298, 299.
coming from parent or person *in loco parentis*, 87, 302.
legatee over, consenting, 299.
on principle of compensation, 299.
where two funds are applicable, 300.
whether Court has power to make orders for, where total fortune of infant exceeds, but fund in Court is less then £500, 48.
MAINTENANCE AND ADVANCEMENT,
jurisdiction, 294.
how limited as to value, 297.
in what Court, 294.
mode of proceeding, 294.
petition for, form of, 298.
in what Court to be presented, 297.
where no guardian or trustee, 297.
reference upon, 298.
dispensed with, 298.
where past maintenance sought, 298.
who should present, 297.
who should be respondents, 297.
MARRIED WOMAN,
defendant may obtain order to defend separately, when, 369.
equity of, to settlement. *See* EQUITY TO SETTLEMENT.
life estate of, in personalty solvent husband may assign for joint lives of husband and wife, 361.
may petition under Trustee Acts, 291.
next friend of, pauper may not be, 369.
party, constitution of suit, 369.
suing *in formâ pauperis*, 369.
vesting order on petition of, form of, 280.

MARSHALLING ASSETS,
in administration suit, 92.
between creditors and legatees, 93.
for charitable legacies, no, 94.
MISTAKE,
when ground for cancellation of agreement, 236, 237.
MORTGAGE,
assignee of, takes, subject to account between assignor and mortgagor, when, 152.
bankruptcy annulled, bankrupt may sue for redemption when, 158.
charges, for arrears of annuity, when enforced in equity, 146.
how created, 145.
remedy sale, 141.
chattels, of, to be registered under Bill of Sales Act, 148.
clandestine, of equity of redemption, forfeiture by mortgagor upon, 175.
consolidation of, 178.
exists only for benefit of mortgagee, 179.
costs of making holder of legal estate defendant, 152.
of parties made necessary by settlement of debt, 153.
of remaindermen in suit by tenant for life of equity of redemption to redeem, 157.
of testator's unreasonable disposition of estate, 154.
of transfer to be borne by mortgagee, when, 152.
conditions of sale, what may be used upon sale of property in, 165.
death of tenant for life of equity of redemption, filing plaint to redeem, 157.
delivery of deeds to prepare legal mortgage creates an equitable, 143.
deposit of deeds by way of mortgage, with whom may be made, 143.
devolution of equity of redemption, 155.
on mortgage of wife's real estate by husband and wife, 155.
when change effected by different limitation, 155.
devolution of legal estate to heir or devisee, 151, 154.
to residuary devisee, 154.
devolution of right to mortgage money, 151. 153.
to specific legatee, 154.
donatio mortis causâ, by delivery of deed, 153.
dowress of equity of redemption may redeem, 157.
equitable, 141.
equitable by deposit, 142.
evidence that deposit was by way of, 143.
further advances, evidence as to, what requisite, 143.
remedy foreclosure, 170.

MORTGAGE—*continued.*
equity, of an, 141.
equity of redemption passes to assignees on bankruptcy, 158.
settled, relative rights of tenant for life and remaindermen, 156.
escheat, no, of estate, 155.
escheat, no, of equity of redemption, 157.
further advances, when can be tacked, 176,
to be charged in writing when, 176.
heir redeeming must pay twenty years arrears of interest, 178.
in fee, or for a term, 140.
insolvent, debts being paid, may sue for redemption when, 158.
interest. *See* INTEREST.
judgment. *See* JUDGMENT.
land, of, must in general be in writing, 142.
proceedings to be commenced where, 18, 139.
lease by mortgagor when valid against mortgagee, 162.
legal estate, protection afforded by getting in, 268.
legal, extrinsic evidence admissible as to, 142.
not after long time, 142.
lien, distinction between, at law and in equity, 147.
in general, 147.
jurisdiction in equity in cases of, 141.
of bonâ fide possessor ejected by person having superior equity, 147.
purchase of reversion set aside, of purchaser, 147.
renewed lease, of trustee of, 147.
solicitor's, 147.
versio in rem, 147.
Locke King's Act, 158.
lord of mortgaged estate may redeem, when, 157.
mortgagee entitled to add costs, charges, and expenses incurred to security, 182.
entitled to pursue all remedies at once, 161, 335.
entitled to six months notice before payment, 159.
second, may purchase under power of sale in first, 165.
selling under power of sale in, cannot purchase, 165.
in possession. *See* FORECLOSURE AND REDEMPTION.
nature and origin of jurisdiction, 140.
notice of, of *chose in action* must be given to debtor, 163.
power of sale improperly exercised, time no bar, 165.
inherent in mortgage of stock and chattels, 166.
purchase under, when valid, 164.
statutory, 164.

MORTGAGE—*continued.*
reconveyance, costs of, when paid by mortgagor, 184.
under Trustee Act, 281.
reputed ownership of chattels in, upon bankruptcy of mortgagor, 163.
sale of property in, cannot be made pending suit, or after tender, 166.
may be by private contract, when, 165.
purchase money left on mortgage, 165.
separate estate, of, by married woman for certain sum, and further advances, 151.
settlement of debt, 152.
ships, of, 148.
stop order to be obtained upon, of fund in Court, 163.
sub-mortgagees and their costs, 152.
tacking of, 175.
advance of mortgagee tacking must be without notice of mesne incumbrance, 176.
as against mortgagor and volunteers under him, 177.
holder from whom legal estate got in must be without notice, 176.
judgment, to, 177.
where legal estate not actually got in, 177.
tenant by curtesy may redeem, 157.
title deeds, leaving in hands of mortgagor, postpones prior to subsequent mortgagee, when, 163.
transfer of, 151.
transfer, on, original mortgage to be kept on foot, 178.
vendee's lien defined, 147.
contractee for lease, 147.
vendor's lien defined, 146.
not waived, when, 146.
parol evidence admissible as to, 146.
waived by taking independent security, 146.
MORTGAGEE,
cutting timber restrained, 333.
elect between law and equity, not bound to, 335.
equitable, whether entitled to vesting order in foreclosure, 285, but see 185.
injunction against, selling, 332.
intestate, vesting order, 280.
in favour of executor, 281.
waste, committing, 333.
when a trustee within Trustee Act, 281.
MORTGAGOR,
by under-lease, trustee of reversion, when, 279.
cutting timber, when restrained, 333.
MULTIPLICITY,
of persons served with notice of decree, 86. *See* ADDENDA.
of respondents to petition, 271.
of shares in suit for partition, 282.

N.

NAME OF FIRM,
sold on winding up partnership, 327.
NEW TRUSTEE,
may obtain vesting order where old trustee refuses to transfer, 284.
objectionable person, 272.
sole, not appointed by Court of Chancery, 288.
whether sole, will be appointed by County Court, 288.
NEW TRUSTEES,
affidavit of fitness of, 288.
appointed by Court powers of, 288.
appointment of, by Court vesting order on, of land, 288.
of stock, 288.
appointment of, under Trustee Act, 285.
cannot be made where competent donee desires to appoint, 286.
charities, of, 289.
consent of persons proposed as, 288.
not appointed where lunacy of trustee sole disability, 287.
original number Court need not keep to, 288.
when no existing trustee, 287.
where trustee abroad, in what cases, 287.
where trustee for sale an infant, 287.
NEW TRUSTEES, POWER TO APPOINT,
on trustee becoming incapable, 287.
on trustee becoming unfit or incapable, 287.
original number must be kept up, 288.
supplied by Lord Cranworth's Act, 285.
NEXT FRIEND,
married woman must institute suit by, as to separate estate, 74.
as to redemption of real estate, 149.
non compos may institute suit by, 369.
NEXT OF KIN,
administration, suit for, by, 68.
decision of Court of Probate conclusive as to, 68.
heir cannot be made party to plaint by, 69.
married woman one of, must be co-plaintiff with husband, 68.
NON COMPOS,
may sue by next friend, 369.
NOTICE,
assignment of *choses in action*, of, to be given to debtor, 163.
motion, of, for an injunction when to be given, 30.
for payment of money into Court, 31.
for a receiver, 31.
purchase bonâ fide without, from mortgagee, when valid, 164.

NOTICE—*continued.*
purchaser bonâ fide without, when good defence in suit for execution of trust, 126.
special defence, of, sufficient without pleading, 22.
tacking of mortgages how far material in cases of, 177.

O.

OPENING BIDDINGS,
in sale by order of Court, 37.
ORDERS,
effect of *ultra vires*, 32.
ne exeat regno, 31.

P.

PARTIES, *generally.*
cannot bid on sale by order of Court without leave of Court, 37.
contingent remainder vesting pending suit, remainderman how made a party, 17.
general rule as to, 16.
relaxed where parties of one class are numerous, 17.
persons entitled to beneficial interest down to first estate of inheritance to be, 17.
persons having concurrent interest with plaintiff to be, 17.
jointly liable with defendant generally to be, 17.
exception to rule, 18.
receivers, 29.

in administration suits, 55.
by creditors claiming in consequence of execution of power, 81.
by creditor for administration of real estate, 63, 64.
by devisee, 80.
by residuary legatee, 78.

in suit for cancellation of agreement, 256.

in suits for the execution of trusts, 113.
breach of trust, suit to repair, 121.
cestui que trust plaintiff, 121.
persons having doubtful claims should be, 115.
trustee plaintiff, 114.

in foreclosure or redemption suits, 149.
co-mortgagees must all be, 150.
co-mortgagor, being abroad, no foreclosure granted, 150.
may redeem co-mortgagors defendants, 149.

PARTIES—*continued.*
deceased mortgagee, heir or devisee of, to be, 155.
mortgagee having assigned debt and estate not to be, 151.
mortgagor not necessary in suit between mortgagee and sub-mortgagee, 153.
personal representative of mortgagor when necessary, 158.
puisne incumbrancers must make subsequent incumbrancers, 158.
remaindermen in equity of redemption necessary, when, 156.
sub-mortgagees necessary, 153.
sureties for mortgagor when necessary, 150.
trustees of equity of redemption when sufficient, 157.
trustees of mortgage debt settled, only proper, when, 152.

in partnership suits.
defendants to suit, 314.
partners, 314.
person appointed by Court to represent estate of deceased partner, 314.
representatives of deceased partners, 314.
stranger should not be defendant unless injunction sought, 314.
who may institute suit, 314.
personal representatives of deceased partners, &c., 314.

in suits for specific performance, 200.
agents when, 200.
assignors of contracts, 201.
generally strangers to contract, not, 200.
exceptions to general rule, 201.
real estate, as to, heir and personal representative of deceased purchaser must be parties, 202.
real estate, as to, heir and personal representative of deceased vendor must be parties, 202.
of married woman, 203.
when vendor bankrupt, 203.
separate estate, for sale of, husband, wife and trustees, must be parties, 203.
PARTITION,
how effected where shares numerous, 282.
PARTNER,
co-owner is not, 305.
though sharing rents, 305.
drawing, indorsing bills, cheques, &c., 306.
expulsion of, 309.
expulsion clauses construed strictly, 309.
lender to, liabilities of, 304, 305.
lunacy of, 308.

PARTNER—*continued.*
notice by, to retire when it cannot be withdrawn, 309.
paying private debt, 306.
pledging credit, goods, &c., of firm, 306.
receiving debts, 306.
releasing debts, 306.
retirement of, 309.
PARTNERS,
agency of, may be restricted by agreement, 306.
but not as against persons without notice, 306.
extent of, 306.
agents each for the other, 306.
authority of, where stranger bound by want of, 306.
losses must contribute to, 323.
not if partnership for illegal object, 323.
though both wrong-doers, 323.
presumption as to shares of, 329.
PARTNERSHIP,
assignment of shares in, 307.
consequences of, 305.
continued after term has expired, dissoluble at will after notice, 308, 309.
but subject to articles, 309.
criterion of, 304.
dissolution of, by decree, 310.
by order in lunacy, 311.
capital being exhausted, 310.
decree, form of, 318.
firm hopelessly insolvent wound up on motion, 310.
mutual confidence being lost, 310.
not dissolved on application of partner solely to blame, 311.
on ground of fraud, 312.
after what time, 312.
costs, 312.
decree, 313.
defendant ignorant that his statements were false, 312.
fraud must be *locum dans*, 312.
nature of relief, 312.
solicitors, agents, &c., concurring in fraud, 312.
on ground of insanity of partner, 311.
dates from decree, 311.
form of inquiry where insanity disputed, 311.
who may obtain, parties, &c., 314. *See* WINDING UP.
dissolved by partner's alienation, 308.
bankruptcy of partner, 308.
death of partner, 308.
marriage of partner *feme sole*, 308.
not by lunacy, 308.

PARTNERSHIP—*continued.*
solicitor partner misappropriating trust funds, 308.
founded on *delectus personæ*, 307.
generally, but not necessarily, result of agreement to share profits, 304.
jurisdiction of County Court, 303, 304.
not result of agreement for rate of interest varying with profits, 304.
or of agreement for share of profits in consideration of loan, or services as clerk, &c., 304.
not result of agreement to share gross returns, 305.
notice to dissolve, 308.
effect of, 308.
may be served upon a lunatic, 308.
requisites of, 308.
where requisite, 308.
profits, excluding source of profits, may be in, 321.
result of agreement to share profits and losses, 304.
shares in, 329.
presumed equal, 329.
what County Court has jurisdiction, 19, 304.
will, dissoluble at, when not for fixed term, 307.
even though firm has incurred debts, 307.
or has taken lease for term, 308.
PARTNERSHIP ILLEGAL, 323.
PAYMENT,
of costs, whether can be enforced by judgment debtor summonses, &c., &c.
of money due under decree, must be made by payment into Court, 28.
PAYMENT INTO COURT,
before grant of probate of administration, 56.
compulsory, based on admissions, 27, 31.
defendant allowed to deduct payments out of fund, 28.
in suits for execution of trusts, 127.
notice of motion for, must be given, 81.
ordered on interlocutory application, where, 27.
parties interested, when to be represented on motion for, 27.
partners, by, 318.
must be mutual, 318.
liberty to apply after, 318.
payment of money due under decree must be made by, 28.
plaintiff may move for, on possible title, 27.
specific performance, in suits for, of purchase money, 230.
PETITION. *See* RESPONDENTS.
proceedings under statutory powers of Court of Chancery to be by, 47.

In proceedings for maintenance and advancement
form of, 298.

PETITION—*continued.*
in what Court to be presented, 297.
where no guardian or trustee, 297.
reference upon, 298.
dispensed with, 298.
where past maintenance sought, 298.
who should be respondents, 297.
who should present, 297.

In proceedings under Trustee Acts.
amendment of, 292, 293. *See* AMENDMENT.
costs of, 293. *See* COSTS.
evidence upon, 292.
of title of beneficiaries strict, not required, 292.
form of, 291.
in what Court to be presented, 291.
old trustees should be served with, 291.
service of, 291.
note as to, 291.
where parties numerous, 291.
where share settled, 291.
who should present, 289—291.
creditors under decree, 291.
infants, married women, &c., 291.
owners of contingent interests, 289.
trustees should not present, 291.

In proceedings under Trustees Relief Acts.
administration upon, 269.
costs, 271—274. *See* COSTS.
Court, in what to be filed, 19.
cross petition, 271.
deed not reformed upon, 269.
evidence in support of, 271.
title of affidavits, 270.
inquiries when ordered upon, 269, 271.
must name petitioner's abode, 270.
order upon, where fund divisible into small parts, 271.
petitioner may appear *in forma pauperis*, 270.
prayer of, 270.
rehearing and appeal, 269.
service, 270.
where share carried to separate account, 270.
where party interested cannot be found, 270.
where parties numerous, 270.
where petition relates to income, 270.
statements in, 270.
suit when directed upon, 269.
title of, 270.
trustee may, but should not present a, 270.
what decided upon, 269.

PLAINT, *generally.*
charges and pretences, when useful in, 14, 24, 35, 160, 205, 256.

PLAINT—*continued.*
claim in Chancery analogous to, 15.
County Court, in what must be filed, 18.
facts to be pleaded as in Chancery, 12.
filing and service of, 19.
frame of, seeking injunction, 15.
jurisdiction of Court as to value, and locality to be shown in, 16.
material facts known to the plaintiff, when to be stated in, 15.
parties to. *See* PARTIES.
prayer of, how to be printed or written, 16.
service of, in foreign district, 20.
on parties added by amendment, 20.
specific relief to be prayed for, 12.

In administration suit.
by creditor, devolution of claim from original creditor to be stated, 58.
when plaintiff is also executor or legatee, 58.
legatee or next of kin, when to be made co-defendant, 59.
by creditor against real estate, form of, 63.
all persons interested in real estate to be parties, 63.
parties to, 63, 64.
special form of, against devisee when real estate sold, 64.
for rents of real estate received, 65.
by creditor claiming in consequence of execution of power, 81.
by creditor holding security, 57.
by devisee, 79.
parties to, 80.
by legatee having legacy charged on land, 79.
executor and devisee must be defendants, 79.
pecuniary, 71.
when time for payment not come, 73.
specific, 76.
residuary, 78.
by next of kin, 69.
debtor to estate, when to be made co-defendant, 58.
form of, 55.
when receiver or injunction prayed for, 56.
when wilful default charged, 57.

In suits for cancellation of agreements.
form of, 256.
forum of, 234.

In suits for execution of trusts.
by *cestui que trust*, 122.
of constructive trustee, 122.

PLAINT—*continued.*
wilful default to be alleged, when, 122.
by creditors claiming under creditors' deed, 105.
by trustee for execution of trusts, 114.

In suits for foreclosure and redemption, 148.
by equitable mortgagee, 149.
by married woman as to her real estate, 149.

In partnership suits, 314. *See* PARTIES.

In suits for specific performance, 203—208.
by purchaser, 203.
lapse of time to be accounted for, 205.
parol agreement, 204.
partly performed, 204.
seeking performance with compensation, 203.
vendor in occupation, 204.
when contract is to be extracted from letters, 204.
when sale was by auction, 204.
wilful default to be alleged and prayed for, when, 204.
by vendor, allegations in support of, on conditional contract, 206.
anticipating probable defence, 205.
damages to be prayed for, 207.
implied acceptance of title, when to be alleged, 208.
knowledge by defendant of defect to be alleged, when, 205.
lapse of time to be accounted for, 205.
ought not to raise questions of title, 205.
seeking compensation, 205.
vendor's personal liability to be stated in, 206.
written agreement, how to be pleaded, 207.
PLEA. *See* DEFENCE.
equitable, effect of judgment on, at law, 252.
of accord and satisfaction, 25.
PLEADING,
conversations, 13, 149.
difference between, in law and equity, 13.
facts to be stated with particularity, 13.
general allegations, when sufficient, 13.
fraud, 13, 24.
letters constituting agreement, 13, 204.
special defence, notice of, sufficient without, 22.
written agreement, 207.
POLICY,
money due under, may be paid into Court, 267
set aside for misrepresentation, when, 241, 244.
PORTION,
on marriage an advancement, 362.

POWER,
administration, suit for, by creditor in consequence of execution of, 81.
donee of, refusing to obey order to execute, 285.
in nature of trust does not fail in default of appointment, 102.
of County Court to commit for breach of injunction, 355.
POWER OF SALE,
implied in executors, when, 280.
incident to every mortgage since 28 Aug. 1860, 164.
in mortgage, 164. *See* MORTGAGE.
informal, purchaser under, a trustee, within Trustee Relief Act, 267.
mortgagee enjoined from exercising, 332.
exercising may pay surplus into Court, when, 267.
purchaser under, from mortgagee enjoined, 332.
vendor having a, over realty, being dead, contract enforced, 202.
POWER TO APPOINT NEW TRUSTEES. *See* NEW TRUSTEES, POWER TO APPOINT.
PRACTICE,
appeal as to costs, when allowed, 41.
bid, parties may not, without leave, on sale by Court, 37.
general orders of Court of Chancery, 337.
opening biddings, 37. *See* ADDENDA.
no revivor for costs, 41.
exceptions to rule, 41. *See* AMENDMENT, COSTS, DEFENCE, DISCOVERY, DOCUMENTS, INJUNCTION, INTERLOCUTORY APPLICATIONS, NE EXEAT REGNO, NEXT FRIEND, PAYMENT INTO COURT, PLAINT, PLEADING, REGISTRAR.
PRAYER,
in plaint, alternative, for foreclosure or sale, 149.
for receiver when necessary, 28.
how to be printed or written, 16.
PRETENCES,
when useful in plaint, 14, 24, 35, 160, 205, 256.
PRODUCTION OF DOCUMENTS. *See* DISCOVERY, DOCUMENTS.
PROSPECTUS OF COMPANY,
containing misrepresentation, contract to take shares when rescinded, 242.
when not rescinded, 258.
PURCHASER,
cannot pay charge on purchased estate into Court, 267.
joint, not a partner, 305.
when entitled to pay money into Court, 267.

R.

RECEIPT CLAUSE,
in absence of, purchaser entitled to pay into Court, 267.

RECEIVER,
administration suit in, not as of course without executor's consent, 79.
in creditor's suit against real estate, 65.
appointed at hearing, though not prayed for, 15.
on *ex parte* application, when, 31.
not on interlocutory application, unless prayed for, 15, 28.
cancellation of agreements, in suits for, 262.
course to be adopted by creditors, &c., when receiver has been appointed, 29.
definition of, 28.
disturbing, a contempt, 28.
foreclosure and redemption, in suits for, 186.
appointed though not prayed for, 188.
at whose instance, 186.
effect of appointment of, 186, 187.
over what property appointed, 187.
infant's property, over, 296.
next friend of infant not appointed, 29.
party to suit seldom allowed salary as, 29.
poundage of, 29.
prayed for when to be, 28.
probate, before, 56.
solicitor in cause not appointed, 29.
specific performance, in suits for, 229.
till further order, 29.
trustee seldom allowed salary as, 29.
REDEMPTION. *See* FORECLOSURE AND REDEMPTION, MORTGAGE, MORTGAGEE, MORTGAGOR.
REFORMATION,
of deed none, under Trustee Relief Act, 269.
REGISTRAR,
accounts and inquiries before, in administration suit, 86.
advertisements to be issued by, in administration suit, 87.
certificate of, in administration suit, 88.
separate for payment into Court, 88.
debts to be proved before, in administration suit, 87.
as to conveyance in suit for specific performance, 227.
deposit of deeds, jewels, &c., with, 28.
inquiry before, as to title in specific performance, 202.
form of certificate, 222.
investment of monies in Court to be in names of treasurer and, 120.
office of, closed on day appointed for payment of mortgage debt, 185.
production of documents at office of, 36.
RE-HEARING,
of petition under Trustee Relief Act, 229.

RELEASE,
defence of, how raised, 24.
in suits for execution of trusts, 125.
when invalid, 125.
trustee cannot insist on, 125, 132.
RESPONDENTS,
to petition claiming no interest, costs of, 274.
RETAINER,
by executor, administrator or trustee in administration suit, 94.
RETIREMENT,
of partner, 309.
REVERSIONARY INTEREST,
post obit bonds, &c., 251.
purchaser of, must shew value adequate, 250.
sale of, by auction proves value adequate, 250.
at undervalue rescinded, 249.
REVIVOR,
no, for costs, 41.
exceptions to rule, 41.

S.

SALE,
puffers not allowed, unless conditions so state, 214.
SALE BY ORDER OF THE COURT, 36.
costs of purchaser where title bad, 37.
decree for, to raise charge, 172.
foreclosure, ordered instead of, 170.
conduct of, 171.
deposit upon, 171.
form of order, 171.
reserved bidding, 171.
when defendant an infant must be for his benefit, 171.
high bailiff not chargeable with auction duty, 38.
inquiry as to incumbrances upon, 37.
opening biddings upon, 37.
powers of judge under decree for, 37.
substituting sub-purchaser on, 37.
SATISFACTION,
of legacy by advancement, 73.
SECURITY FOR COSTS, 335, 20. *See* Costs.
SERVANT,
sharing profits, not a partner, 304.
SERVICE,
of notice of decree for administration, 85.
of notice upon lunatic co-partner, 308.
of plaint, 19.
in foreign district, 20.
on parties added by amendment, 21.

SET-OFF,
no, against specific legacy, 77.
notice of, sufficient without pleading, 22.
when defence to suit for administration, 73, 123.
SETTLED ACCOUNT. *See* ACCOUNTS.
SHARES,
not assignable at common law, 307.
SHERIFF,
enjoined from levying execution on partnership goods, 316.
SOLICITOR,
contract for sale between client, when rescinded, 248.
when good, 259.
in cause, not appointed receiver, 29.
lien of, 147.
of trustee not entitled to lien for costs on trust property, 137.
one of firm drawing bills, 306.
trustee, when entitled to professional charges, 132.
SPECIAL DEFENCES,
effect of, in administration suit, 82.
must be raised at hearing, 84.
notice of, 21, 72, 160.
specific performance in suits for, 219.
SPECIFIC PERFORMANCE,
acceptance of title implied, 208.
agreement for sale or purchase, 191—197.
by trustees when not enforceable, 193.
corporations, when competent parties to, 192.
infants not competent to enter into, 191.
lunatic not competent to enter into, 191.
married woman, when competent to enter into, 191.
must be concluded, 194.
notice to treat under Lands Clauses Consolidation Act, 194.
parol, defence at law to, 193.
requisites of, 191.
competent parties, 191.
consensus in idem, 191.
written, defence at law to, 193, 194.
mistake of one party as to meaning of, a defence, 194.
not in conformity with true meaning, 194.
parol evidence as to, rejected at law, 194.
assignees of property contracted to be sold when bound by contract, 202.
bankrupt purchaser, assignees of, may repudiate or perform contract, 203.
certificate as to title, 222.
in favour of title reversed, when sent back, 222.
form of, 223.
form of notice of motion to vary, 222.
motion to vary when heard, 224.

SPECIFIC PERFORMANCE—*continued.*
new evidence after confirmation, when, 223.
compensation, with, 199, 227.
for misdescription, 199.
purchaser knowing of defect cannot have, 200, 213.
not granted if difference very great, 199.
contract by agents, 192.
ratification, 192.
where principal named, 192.
where principal not named, 192.
by corporations, 192.
when *ultra vires*, 193.
by promoters of companies, 192.
by trustees for sale when not enforceable, 193.
for sale of goods not enforced, 196.
exceptions to rule, 196.
must be certain, 194—209.
as to price, 193.
as to subject-matter, 194.
as to other terms, 195.
vendor when entitled to rescind, 222.
conveyance, how settled, 227.
conveyancing counsel, when referred to, 227.
County Court in, agreement must be for sale or purchase, 190.
price must be a gross sum, 190.
costs of witness, 230—233. *See* COSTS.
creditors of deceased vendor cannot enforce contract, 202.
exception to rule, 202.
damages, being adequate compensation, no, 195.
at law when title cannot be made, 196.
alternative prayer, for when not allowed, 255.
power of Court of Chancery to award, 197, 207.
deceased vendor having power of sale of realty, 202.
decree on further consideration. *See* FINAL DECREE, *infra.*
at hearing, 220.
inquiry as to title, 220.
when restricted, 220.
deeds, delivery of, to purchaser, 227.
defence to suits for, 208, 209. *See* DEFENCE.
deposit, return of, when ordered, 228.
dismissal of plaint, 228.
without prejudice to action, 228.
doubtful title, purchaser to file plaint, 219.
evidence, 219.
parol when admissible, 220.
increased by Sir Hugh Cairn's Act, 220.
final decree, 224.
form of, when no inquiry as to title, 224.

SPECIFIC PERFORMANCE—*continued.*
when purchaser plaintiff, 225.
special directions, or inquiries, 225.
compensation, inquiry as to, 227.
just allowances, what, 225.
indemnity, purchaser must give personal, against vendor's personal liability, 206.
purchaser without notice not bound to give, 206.
injunction restraining action for deposit or expenses, 229.
special, for preservation of property, 229.
inquiry as to title before registrar, 221.
mode of prosecuting, 221.
interest on purchase-money, 226.
interlocutory applications, 228—230.
jurisdiction, 189.
in equity as to, origin of, 190.
of County Court, extends to sales and purchases only, 190.
mode of proceeding, 190.
ne exeat regno, granted against purchaser, 230.
parol agreement part performance of, 210. *See* DEFENCE
plaint for, 203—208. *See* PLAINT.
plaint, in what Court to be filed, 190.
plaintiff must come into Court with clean hands, 214.
payment into Court of purchase-money when ordered, 230.
purchaser buying up outstanding interest, 213.
receiver, when appointed, 229.
subject-matter of contract, 191.
certainty as to, 198.
nature of, when sale enforced, 95, 198.
not where damages adequate compensation, 195.
suit for, parties to, 200. *See* PARTIES.
tenant for life, *sans* waste, contracting to sell fee, 252.
title bad purchaser not bound to take, 224.
right of vendor to amend, till certificate, 221.
what is a good, 222.
uberrima fides required, 214.
puffers not allowed unless stated, 214.
vendor discovering defect after contract, should institute suit, when, 213.
ST. LEONARD'S ACT (LORD), 274.
applies only to question of management, 275.
does not apply to cases merely hypothetical, 275.
nor to matters of mere detail, 275.
petition under, inquiry not allowed upon, 275.
may be presented by one trustee, 275.
must be signed by counsel, 275.
no appeal from opinion, &c., on, 276.
no evidence admissible, 275.
service of, 276.

STAKEHOLDER,
a trustee within Trustee Relief Act, 267.
STATUTE OF FRAUDS,
agreement cannot be divided to satisfy, 209.
contracts which are not within, 211.
equitable mortgage when not within, 142, 143.
in specific performance defence of, to be pleaded, 208.
note or memorandum of agreement sufficient, 209.
part performance taking case out of, 210.
acts must refer to contract, 211.
terms of agreement must appear, 211.
what amounts to, 210.
signature of agreement, what sufficient, 210.
timber or share in mines not within, 208.
trusts of realty must be in writing by, 100.
copyholds and chattels real, 101.
subsequent written acknowledgment of trust sufficient, 100.
STATUTE OF LIMITATIONS,
administration, in suits for, 65, 72, 82.
acknowledgment defeating, 161, 162.
debts, interest and legacies, when barred by, 83.
execution of trusts, in suits for, 124.
cestui que trust in reversion has no further time when trustee barred, 124.
foreclosure suits, in, 159.
does not apply to chattels, 162.
mortgagee, 159.
time begins to run when, 159.
fraud, when time begins to run in cases of, 124.
interest, as to, in mortgage debt, 180.
notice of special defence of, sufficient without pleading, 24, 72, 124, 160, 162.
redemption suits in, 161.
defeated by acknowledgment, 161, 162.
disability of mortgagor, whether extends time, 162.
time begins to run, when, 162.
time begun to run not suspended, 160.
STAYING PROCEEDINGS,
costs of, pending appeal, 43.
pending appeal when permitted, 45.
pending plaintiff's election between law and equity, 335.
giving security for costs, 335.
till next friend of married woman gives security for costs, 369.
STOCK. *See* TRUSTEE ACT, 1850, VESTING ORDER OF STOCK.
course where one trustee wrongfully refuses to transfer, 283.
STOP ORDER, 335.
evidence necessary on petition for, 336.

STOP ORDER—*continued.*
form of, 336.
mode of obtaining, 336.
petition for, 336.
service of, 336.
SUB-PARTNERSHIP,
may be dissolved before principal partnership, 307.

T.

TENANT FOR LIFE,
petitioning under Trustee Relief Act, who should be served, 271.
costs of, 273. *See also* FORECLOSURE AND REDEMPTION.
TIMBER,
injunction against mortgagor or mortgagee felling, 332, 333.
TRADE MARK,
of partnership sold on winding up, 327.
TRANSFER OF CAUSE,
to another County Court, 19.
order for, whether subject to appeal, 44.
to Court of Chancery, 10.
where deed on which plaintiff sues is voidable, 25.
where infant is interested in fund in County Court and other funds, 48.
where trustee has died with estate over 500*l.* and assets not admitted, 47.
TRUSTEE, TRUSTEES. *See* CESTUI QUE TRUST, TRUSTS.
acceptance of office by, 112.
allowances to, 131.
application by, for advice as to co-trustee's breach of trust, 118.
bonus paterfamilias must act as, 118.
bound to accumulate, charged with compound interest, 131.
breach of trust by co-trustee, application to Court as to, 118.
suits to repair, 117.
cestui que trust must indemnify, 132.
should not be appointed a trustee, 101.
remedies of, against, 110.
charged with profits or 5 per cent. compound interest, investing monies in trade, 130.
if trader, and pays trust monies to general account, 130.
constructive, 279.
contract for sale between *cestui que trust* and, rescinded, 249.
converting trust property tortiously, 110.
costs, charges and expenses of, 133, 138. *See* COSTS.

TRUSTEE, TRUSTEES—*continued.*
depreciatory conditions, cannot sell under, 217.
directors of public Company trustees for shareholders, 112.
disclaimer of estate, 112.
by *feme covert*, 113.
of office, 112.
distributes estate at his own risk, 118.
duties of, as to residuary personalty, 119.
employing collectors, accountants, &c., allowed their costs, when, 132.
executor and, cannot prove will and disclaim trusts, 112.
expenses, occasioning unnecessary, by mode of raising his case, 40, 114, 136.
factor, agent, or partner making profit at expense of principal or partner accountable as, 111.
heir at law a, cannot disclaim, 113.
injunction against, 117.
selling improperly, 332.
interest, charged with, 130. *See* INTEREST.
liable, when, for acts of co-trustee, 121.
majority may pay in under Trustee Relief Act, 226.
mixing trust monies with his own, 110, 119.
name of, when *cestui que trust* may require to use, 117.
new, without notice, not liable for not inquiring as to monies not received by former trustees, 129.
not having legal estate must give notice, 118.
not liable merely for signing receipt for conformity, 121.
number of, keeping up, 116.
payment into County Court by, should not be under Trustee Relief Act, 266.
how effected, 266.
when trustee feeble, 267.
pending suit cannot act without leave of Court, 126.
plaint by, for execution of trusts, 114.
plaintiff in suit for execution of trusts, 114.
quasi-trustee defined, 113.
receiver with salary appointed will not be, 29.
relatives should not be appointed new, 101.
removal of, causes for, 116.
must be by plaint, 116.
release, cannot insist on, 120, 132.
renewing leaseholds, 111.
representative of a deceased, entitled to costs of suit to discharge him, 114.
retiring without reason must pay costs of suit, 114.
severing, 136.
solicitor, 132.
stipulating for remuneration, when allowed, 132.
suing should join with co-trustees, 115.
trouble, not entitled to charge for, 132.
constructive, may be allowed for, 133.
who may be a, 101.

TRUSTEE ACTS, 278.
jurisdiction, 278.
when likely to be resorted to, 290.
mode of proceeding, 278.
to what Court petition to be presented, 18, 278.
TRUSTEE ACT, 1850. *See* PETITION.
appointing person to convey, 282.
definition of trustee, 279, 280.
of trust and mortgage, 281.
heir, where mere direction to sell, a trustee, 280.
where trustee disclaims, 280.
order, discharge of, 293.
form of, 293.
supplemental, 293, note.
partition under, 282.
petition, 291. *See* PETITION.
removal of trustee under, no, 287.
trustee to bar dower within, 280.
vesting order of land,
contingent rights, estates of infants, unborn persons, &c., devested, 284.
copyholds, 284. *See* COPYHOLDS.
declaration against dower not inserted, 280.
form of, where one petitioner *feme coverte*, 280.
leaseholds, 281, 288.
of equities not granted, 289.
to uses to bar dower, 280.
trustees, effect of order vesting in new and old, 280.
where new trustee is appointed, 288.
vesting order of stock,
cestui que trust may obtain, *semble*, 282.
extends to future as well as past dividends, 283.
obtainable against executrix's husband abroad, 283.
obtainable against infant sole trustee, 282.
obtainable against two representatives of sole trustee, deceased, 283.
under ss. 23, 24, not obtainable by tenant for life, except as to income, 284.
under ss. 23, 24, not obtainable by one of two trustees, 284.
where new trustee is appointed, 288.
TRUSTEE RELIEF ACT (10 & 11 VICT. c. 96).
jurisdiction of County Court, 264.
money, &c., cannot be paid into County Court under, 265.
paid to Accountant General cannot be reached by order of County Court, 265.
payment in, 269.
affidavit, form of, 269.
liability of trustee after, 268.
of fund bequeathed in aliquot shares, 268.
to what account, 268.
payment out, without changing title of account, 268.
must be upon petition, 270.

TRUSTEE RELIEF ACTS. *See* PETITION.
jurisdiction of County Court, 263.
mode of proceeding, 263.
proceedings where to be commenced, 263.
TRUSTS,
banker responsible for transferring money to account of trustee, 251,
breach of, suits to repair, 117.
application by co-trustee to Court for advice as to, 118.
parties to suit, 121.
consideration unnecessary to support, 100.
construction of, determined at hearing, 102.
constructive, 109.
cost of suit for execution of, 133—138. *See* COSTS.
control of trust property, 121.
shares in one name improper investment, 121.
trustee not liable for signing receipt for conformity, 121.
creation of, 100, 102.
of personalty may be by parol, 100.
of realty must be in writing, 100.
subsequent written acknowledgment sufficient, 100.
creditors' deeds under, 104. *See* CREDITORS' DEEDS.
declared, requisites of, 99.
declared, resulting or constructive, 99.
decree at hearing in suits for execution of, 128, 129. *See* DECREE.
defences to suits for execution of, 123—126. *See* DEFENCES.
evidence at hearing in suits for execution of, 128.
further consideration in suits for execution of, 133.
interest when charged against trustee in suits for execution of, 130. *See* INTEREST.
interlocutory applications in suits for execution of, 127.
for injunction, 127.
for payment into Court, 127.
for receiver, 127.
jurisdiction of County Court in suits for execution of, 98.
just allowances in, 131—133.
pending suit for execution of, trustees can do no act except by leave of Court, 126.
trustee may not pay to husband of married woman a party, 127.
plaint for execution of, 122. *See* PLAINT.
powers in nature of, do not fail in default of appointment, 102.
precatory, 102.
property abroad when subject of, 99.
resulting, 107.

TRUSTEE RELIEF ACTS—*continued.*
created by purchase in name of another, 108.
devolution of resulting benefit, 107.
in case of purchase in name of child, 108.
wife, grandchild, &c., 109.
on purchases by several as joint tenants, 109.
parol evidence rebutting, 107, 108.
settlor, who can be, 100.
subject of, what may be, 99.
suits for execution of, 113.
cestui que trust plaintiff, 115.
parties to, 121.
parties, 113. *See* PARTIES.
trustee plaintiff, 114. *See* CESTUI QUE TRUST, TRUSTEE.
ULTRA VIRES,
contracts by corporations cannot be enforced, 193.
effect of orders *ultra vires*, 32.
UNBORN PERSON,
estate of, devested under Trustee Act, 284.
form of order, 285.
UNDERTAKING AS TO DAMAGES,
on *ex parte* order should extend to costs, 334.
on *interim* injunction, 30.

V.

VALUE,
administration suit, in, questions as to, 84.
VENDOR AND PURCHASER. *See* SPECIFIC PERFORMANCE, CANCELLATION OF AGREEMENTS.
delay of purchaser when ground for cancellation of agreement, 253.
inadequacy of price when ground for cancellation, 246.
misrepresentation by purchaser, contract when set aside for, 241.
property misdescribed by vendor, contract set aside, when, 243, 244.
purchaser, duties of, with respect to property, 244.
vendor, acquiring legal estate after conveyance a trustee, 297.
duties of, with respect to property, 244.
having no title, purchaser can sue for cancellation of agreement, when, 253.
of land dying before completion, heir not in general a trustee, 279. *See* ADDENDA.
of stock, shares, &c., trustee within the Trustee Act, 279.
VOLUNTARY SETTLEMENTS, 103.
by declaration of trust, 104.
choses in action, of, 104.
creditors' deed, 104. *See* CREDITORS' DEED.
stock, shares, &c., of, 104.
voluntary agreement for, 103.

WARD OF COURT,
guardian of, Court may appoint, 295.
notwithstanding testamentary &c. guardian, 295.
duties of, 296.
maintenance and education of, 296.
marriage of, 296.
settlement on, 296, 297.
where marriage without leave, 296.
may be removed from parents, &c., 296.
of Chancery who is, 295, 297.
of County Court, whether infants can become, 295.
persons aiding to take abroad, guilty of contempt, 296.
persons marrying, or assisting to marry, guilty of contempt, 296.
receiver and manager of property of, 296.
WARRANT,
of committal by County Court, 357.
by Lord Chancellor, 358.
WASTE,
mortgagee restrained from, 332.
mortgagor restrained from, 332.
WIDOW,
legacy to, in lieu of dower entitled to priority, 74.
of partner receiving annuity, not a partner, 304.
WILFUL DEFAULT,
administration suit, in, 57.
cancellation of agreements, in suit for, whether accounts with, 261.
execution of trusts, in suits for, 122.
new trustees without notice not liable for not inquiring as to default of former trustees, 129.
mortgagee in possession accounts taken with, against, 181.
unfinished houses, as to, 181.
specific performance in suits for, to be alleged and prayed for, 204.
when to be alleged and proved, 14.
when to be proved at hearing, 32.
WILL,
construction of, when decided, 71, 74, 76, 78.
WINDING UP OF PARTNERSHIP. *See* PARTNERSHIP, PARTNERS, JOINT ESTATE.
accounts, agreed upon mode of taking, varied by usage, 325.
how far continued, 325.
partner charged with profits made *mala fide*, 323.
retaining assets after devolution, 326.
principle on which taken, 323.
allowance for carrying on business after dissolution, 324.
for trouble, no, 324.
where executor carries on business, no, 324.
where expense unauthorized, no, 324.
unless ratified, 324.

WINDING UP OF PARTNERSHIP—*continued.*
contribution to losses, 323.
in what proportions, 323.
where both partners wrong doers, 323.
where loss arises from error of one partner, 324.
where one partner insolvent, 323.
where partner acts *ultra vires*, 324.
decree at hearing, 318.
final, 329.
defence, 315.
denial of partnership, 315.
statute of limitations, 315.
acknowledgment defeating, 315.
injunction, 316.
against assignees, 316.
carrying on the business, 316, 317.
divulging trade secrets, 316.
drawing or negotiating bills in name of firm, 316.
holder of bill improperly drawn, &c., 316.
obstructing business, 316.
removing books, 316.
sheriff, 316.
no, against surviving partner using style of old firm, 316.
where executors of deceased partner set up title at law, 316.
where surviving partner sets up title at law, 316.
inquiry what share partner entitled to, 329.
interest, partner not entitled to, 324.
not liable to pay, 324.
unless fraud, 324.
issue, what share partner entitled to, 329.
payment into Court, 318.
of money obtained *malâ fide* is, of course, 318.
liberty to apply when reserved, 318.
premium, what part returned when partnership dissolved, 325.
production of books, &c., though relating to extraneous matters, 326.
but with liberty to seal up, 326.
where partner refuses, 326.
profits on capital improperly retained, 326.
realization of assets, 326—329.
advertisements of sale, 326.
debts not sold apart from business, 326.
goodwill sold upon, 327.
in general by sale, 326.
inquiry as to mode of, 326.
leave to partner to bid, 327.
to propose himself as interim manager, 327.
mode of, provisions as to, construed liberally, 329.

WINDING UP OF PARTNERSHIP—*continued.*
name of firm sold upon, 327.
trade mark sold upon, 327.
where some of the parties infants or lunatics, 329.
receiver, 317. *See* RECEIVER.
and manager, partner may be, 317.
leave to partner to propose himself as, 318.
delivery of books to, 318.
against surviving partner, 317.
granted where partner drives away customers, 317.
excludes co-partner, 317.
misappropriates assets, 317.
refuses to enter receipts, 317.
may be appointed though partnership alleged to be illegal, 317.
no, in general against member of firm, 317.
no, pending issue as to fact of partnership, 317.

THE END.

RAYNER AND HODGES, PRINTERS, FETTER LANE, E.C.

A SUPPLEMENT

TO

A TREATISE

ON THE

Jurisdiction, Pleadings and Practice

OF

THE COUNTY COURTS IN EQUITY.

INCLUDING

THE LAW AND PRACTICE OF PARTITION.

BY

EDMUND CHISHOLM BATTEN, M.A.,

AND

HENRY LUDLOW, M.A.,

OF LINCOLN'S INN, ESQRS., BARRISTERS-AT-LAW.

LONDON:

WILLIAM AMER, LINCOLN'S INN GATE,

LAW BOOKSELLER AND PUBLISHER.

1872.

CONTENTS.

	Page
Preface - - - -	iii
The Partition Act, 1868 - - - -	1
Partition Suits - - - - -	3
Supplement to Batten and Ludlow on the County Courts - - - - - -	33

PREFACE.

THE Partition Act of 1868* has now been in operation sufficient time to allow a tolerably clear idea to be formed of its practical working, and numerous cases depending upon it have come before the Courts. It has, therefore, seemed to the authors not inopportune to offer to the profession a concise treatise on the Law and Practice of Partition. The Act referred to gives a jurisdiction in certain cases to the County Courts, and as the authors have already published a work on the Jurisdiction and Practice in Equity of these tribunals, references have in the following pages been made to it, wherever they seemed likely to assist the County Court Practitioner.

The present publication has also afforded a convenient opportunity of making a few additions to the authors' work on the County Courts. The material alterations in the law, so far as they had to deal with it, have been but few, and, in some instances, were anticipated by them. The important cases and enactments subsequent to 1865 will be found in the Supplement at the end of these pages, and will, it is hoped, render the book a trustworthy guide down to the present time.

E. CHISHOLM BATTEN.
HENRY LUDLOW.

, NEW SQUARE,
LINCOLN'S INN.
December, 1871.

* 31 & 32 Vict. c. 40.

TABLE OF CASES.

	Page
Adames v. Hallett	37
Agar v. Fairfax	4, 6, 8, 18, 20, 27
Alexander, Lester v.	18
——— v. Mills	40
Ames v. Commyns	21
Angell, Davis v.	36
Anonymous	9
Armstrong, Fleming v.	28
Arnold, Cattley v.	25
Arthur v. Lamb	29
Aston v. Meredith	13
Atwood v. Maude	44
Austin, Mildred v.	38
Aylward, Dolphin v.	40
Backhouse v. Paddon	11, 16
Bacon, Peters v.	17, 18
Bagshaw, Evans v.	7
Bailey v. Hobson	29
Baker, Landell v.	28
—— v. Wait	34
Baring v. Nash	7, 10, 11, 17
Barlow, Slade v.	11, 16
Barnard v. Ford	45
Barnes, Pemberton v.	16
——— v. Wood	40
Barnwell, Howard v.	25
Barrs v. Fewkes	35
Baskcomb v. Beckwith	40
Baynes, Warner v.	15, 19
Baxter v. Hosier	26
Beaty v. Curzon	42
Beckwith, Baskcomb v.	40
Beevor v. Luck	39
Bird, Doe d. Hellings v.	27
Blakeway, Steward v.	43
Bloomar, Re	24
Bloome, Jesus College v.	34
Bodycote v. Steers	25
Bolton v. Bolton	10, 11, 16
Boucher, Wood v.	42
Bowles v. Rogers	41
Bowra v. Wright	23
Bowyer v. Griffin	38
Bradford, Dinham v.	43, 44
Brassey v. Chambers	8, 25
Brickenden v. Williams	36
Briggs, Garner v.	35
Bristol, Mayor of, Wedmore v.	40
Brittlebank v. Goodwin	36, 37
Brock v. Hamilton	4
Brook v. Hertford, Lord	8
Brooke v. Browne	15
Browne, Brooke v.	15
Brunt, Dodkin v.	43
Burchell, McMahon v.	27
Burdick v. Garrick	35, 36
Burgess, Ransome v.	43
Burrell v. Smith	36
Burton, Langton v.	15
Calne Railway Company, In re	38
Campbell v. Campbell	36
Canning v. Canning	22
Cannon v. Johnson	28
Cardigan, Earl of, v. Montagu	15
Carnegie, Hope v.	44
Carter v. Carter	38
Cartwright v. Pulteney	9, 10, 11, 17
Caton v. Caton	40
Cattley v. Arnold	25
Chadebet, Roebuck v.	25
Chambers, Brasseyv	25
——— Turpin v.	40
Charlesworth, Manners v.	20, 21
Cheesewright v. Thorne	35
Chichester, Myddleton v.	38
Chir v. Philpott	11
Cholmondeley v. Clinton	9
Churchill, Sheppard v.	23
Clarendon, Earl of, v. Hornby	21, 25
Clark, Herring v.	42
Clarke v. Clayton	25
Clayton, Clarke v.	25
——— v. Renton	37
Clinton, Cholmondeley v.	9
Collinson v. Collinson	15
Commyns, Ames v.	21
Cook, Miller v.	41
Cooper v. Fisher	6, 27

	Page
Cope, Haywood v.	41
Corbet v. Davenant	23
Cornish v. Gest	28
Corsellis v. Patman	39
Cotton v. Wyld	40
Cowbridge Railway Co., In re	38
——— Guest v.	38
Cox v. Cox	28
—— Ley v.	25
Crook v. Seaford, Corporation of	40
Croxton v. May	45
Cuming, In re	42
Currie, Hazell v.	35
Curtis, Hill v.	36
Curzon, Beaty v.	42
——— v. Lyster	20
Cuthbert v. Wharmby	36
Dalbiac, Pennington v.	17
Davenant, Corbet v.	23
Davies v. Turvey	19
Davis v. Angell	36
Dawson, Stamford, Earl of, v.	37
——— Whalley v.	5
Day, Duberly v.	39
Dearden, Heaton v.	7
De la Touche's Settlement, In re	42
Denny v. Hancock	35, 40
Dering, Thomas v.	40
Dinham v. Bradford	43, 44
Dodds v. Gronow	12, 17
——— Henderson v.	37
Dodkin v. Brunt	43
Doe d. Hellings v. Bird	27
—— d. Fisher v. Rosser	27
Doggett v. Eastern Counties Railway Co.	35
Dolphin v. Aylward	40
Downes, Trodd v.	15
Drury v. Drury	6, 26, 27
Duberly v. Day	39
Duddell v. Simpson	40
Duggan's Trusts, In re	42
Eason, Henderson v.	26
—— v. Henderson	27
Eastern Counties Railway Co., Doggett v.	35
Eckford, Haldane v.	35
Ely, Bishop of, v. Kenrick	10
Engell v. Fitch	39
Evans v. Bagshaw	7
Eyden, Gibbins v.	36
Fairclough, Tyson v.	29
Fairfax, Agar v.	4, 6. 8, 18, 20, 27
Fewkes, Barrs v.	35
Fisher, Cooper v.	6, 27
——— Doe d., v. Rosser	27

	Page
Fitch, Engell v.	39
Fleming v. Armstrong	28
Ford, Barnard v.	45
—— v. Olden	38
Fothergill, Homfray v.	39
Fox, Hope v.	36
Fryer, Hensman v.	35
Fullbrook, Hill v.	28
Furze, Locke v.	39
—— v. Sherwood	34
Garner v. Briggs	35
Garrick, Burdick v.	35, 36
Gaskell v. Gaskell	7, 10
Gerard, Parker v.	11, 15, 19
Gest, Cornish v.	28
Gibbins v. Eyden	36
Gibbon, Phillipson v.	40
Giffard v. Williams	11, 16, 17
Gilliat v. Gilliat	40
Glenton, Williams v.	41
Goodess v. Williams	9
Goodtitle v. Tombs	27
Goodwin, Brittlebank v.	36, 37
Goodwyn v. Spray	29
Gordon's Trust, In re	42
Graham, In re	43
——— v. Graham	38
Great Eastern Railway Company, Pope v.	41
Greenwood v. Percy	25
Greer v. Mercer	28
Griffin, Bowyer v.	38
Griffiths, Summers v.	41
Gronow, Dodds v.	12, 17
Gudgeon, Linford v.	34
Guest v. Cowbridge Railway Company	38
Guinan, North v.	7, 19
Gunson v. Simpson	43
Haldane v. Eckford	35
Hallett, Adames v.	37
Hamilton, Brock v.	4
Hanbury v. Hussey	25
Hancock, Denny v.	35, 40
Handley, In re	36
Hare v. Lea	34
Harman, Robinson v.	39
Harwood, Isaacson v.	36
Hawksworth v. Hawksworth	43
Hayward v. Smith	26
Haywood v. Cope	41
Hazell v. Currie	35
Heathcote, Martin v.	43
Heaton v. Dearden	7
Hedges, Herbert v.	28
Hellings, Doe d., v. Bird	27

	Page
Henderson v. Dodds	37
——— v. Eason	26
——— Eason v.	27
Henniker, Wythe v.	37
Hensman v. Fryer	35
Henson, Popple v.	41
Herbert v. Hedges	28
Heritage, Scotto v.	34
Herrick, White v.	43
Herring v. Clark	42
——— v. Hoe	9
Hertford, Lord, Brook v.	8
Hewitson v. Sherwin	35
Hill v. Curtis	36
——— v. Fullbrook	28
Hillacre, White v.	39
Hine, Picard v.	33
Hoare v. Osborne	36
Hobson, Bailey v.	29
——— v. Sherwood	7
Holdsworth, Thorpe v.	39
Hoe, Herring v.	9
Hole v. Thomas	29
Holland v. Holland	36
Homfray v. Fothergill	39
Hope v. Carnegie	44
——— v. Fox	36
Hopkins v. Hopkins	9
——— Singleton v.	9, 28
Hornby, Clarendon, Earl of, v.	21, 25
Horne, Wheeler v.	26
Hosier, Baxter v.	26
Howard v. Barnwell	25
Hoy v. Smithies	40
Hunter v. Walters	28
Hurry v. Hurry	12, 17
Hussey, Hanbury v.	25
——— Mullins v.	35
Hutton v. Sealey	13
Isaacson v. Harwood	36
Isle of Wight Railway Company, Munns v.	41
Jacobs v. Seward	27
James v. Lichfield	43
Jesus College v. Bloome	34
Johnson, Cannon v.	28
——— Story v.	21, 22
Jones v. Robinson	15
——— v. Totty	21, 22
Jope v. Morshead	8, 17
Joseph's Will, In re	41
Joyce's Estate, In re	42
Kenrick, Ely, Bishop of, v.	10
Kershaw's Trusts, In re	43
Knowlys v. Martyn	27
Lamb, Arthur v.	29
Landell v. Baker	28
Langton v. Burton	15
Lea, Hare v.	34
Lee, Stannard v.	35
Lester v. Alexander	18
Ley v. Cox	25
Lichfield, James v.	40
Lilford, Lord, v. Powys Keck	37
Linford v. Gudgeon	34
Lipscomb v. Lipscomb	39
Lister v. Lister	21
Locke v. Furze	39
Lorimer v. Lorimer	6, 26
Luck, Beevor v.	39
Lyne v. Lyne	28
Lys v. Lys	25
Lyster, Curzon v.	20
McAdam, Simons v.	34
McMahon v. Burchall	27
Magnay, Middleton v.	41
Manaton v. Squire	6
Manners v. Charlesworth	20, 21
Mansfield, Mole v.	22
Marner's Trust, In re	42
Marriott, Miller v.	28
——— Turner v.	41
Marshall, Wilcox v.	39
Marshfield, Talbot v.	38
Martin v. Heathcote	43
——— v. Powning	37
Martyn v. Knowlys	27
——— v. Perryman	6, 10
Mason's Trust, In re	42
Matthew, Pyne v.	6
Matthews, Ex parte	35
Maude, Atwood v.	44
Maudesley v. Maudesley	33
May, Croxton v.	45
Mercer, Greer v.	28
Meredith, Aston v.	13
Middleton v. Magnay	41
Mildred v. Austin	38
Miller v. Cook	41
——— v. Miller	43
——— v. Marriott	28
——— v. Warmington	7
Mills, Alexander v.	40
Mole v. Mansfield	22
Molyneux, Re	24
Montagu, Cardigan, Earl of, v.	15
Moore, Stokes v.	40
Morgan v. Morgan	27
——— Turner v.	15, 19, 27
Morris v. Timmins	28
Morshead, Jope v.	8, 17
Mullings v. Trinders	40

	Page
Mullins v. Hussey	35
Mundy v. Mundy	16
Munns v. Isle of Wight Railway Company	41
Myddleton v. Chichester	38
Nash, Baring v.	7, 10, 11, 17
Needham, Peers v.	21
Nelson v. Seaman	34
Newbery, In re	43
Newcastle, Duke of, In re	38
Newton v. Newton	38
Nicholson, Upperton v.	40
North v. Guinan	7, 19
Northumberland, Duke of, Watson v.	23
Norway v. Rowe	29
Nowell v. Nowell	43
Olden, Ford v.	38
Onions, Smallman v.	29
Osborn v. Osborn	28
Osborne, Hoare v.	36
Owen, Riches v.	37
Paddon, Backhouse v.	11, 16
Palmer v. Walesby	45
Parker v. Gerard	11, 15, 19
—— Thackeray v.	19, 28
Pascoe v. Swann	27
Patman v. Corsellis	39
Peat's Trusts, Re	27
Peers v. Needham	21
Pemberton v. Barnes	16
Pennington v. Dalbiac	17
Percy, Greenwood v.	25
Perryman, Martyn v.	6, 10
Peters v. Bacon	17, 18
Phillipson v. Gibbon	40
Philpott, Chir v.	11
Picard v. Hine	33
Pilcher v. Rawlins	38
Pope v. Great Eastern Railway Company	41
Popple v. Henson	41
Portland, Duke of, Topham v.	35
Potter v. Waller	10
Powell v. Riley	36
—— v. Roberts	38
Powning, Martin v.	37
Powys Keck v. Lifford, Lord	37
Pulteney, Cartwright v.	9, 10, 11, 17
Pyne v. Matthew	6
Pyncent v. Pyncent	9
Pyrke v. Waddingham	41
Ransome v. Burgess	43
Rawlins, Pilcher v.	38
Renton, Clayton v.	37
Rice's Trust Deed, In re	42
Richards, In re	36
Richardson v. Smith	39
—— Sturton v.	26
—— v. Young	38
Riches v. Owen	37
Rigden, Vane, Earl, v.	36
Roberts, Powell v.	38
Robinson v. Harman	39
—— Jones v.	15
Roebuck v. Chadebet	25
Rogers, Bowles v.	41
Rosser, Fisher, Doe d., v.	27
Rowe, Norway v.	29
—— v. Young	41
Schneider, Wilkinson v.	45
Scoles, Wood v.	43
Scotto v. Heritage	34
Seaford, Corporation of, Crook v.	40
Sealey, Hutton v.	13
Seaman, Nelson v.	34
Searle v. Smales	29
Seward, Jacobs v.	27
Sheppard v. Churchill	23
Sherwin, Hewitson v.	35
Sherwood, Furze v.	34
—— Hobson v.	7
Silver v. Udall	17
Simons v. McAdam	54
Simpson, Duddell v.	40
—— Gunson v.	43
Singleton v. Hopkins	9, 28
Slade v. Barlow	11, 16
—— Wills v.	7, 10
Smales, Searle v.	29
Smallman v. Onions	29
Smirthwaite's Trusts, Re	43
Smith, Burrell v.	36
—— Hayward v.	26
—— Richardson v.	39
Smith's Mortgage, In re	41
—— Trusts, In re	42
Smithies, Hoy v.	40
Sparrow, Re	42
Speke v. Walrond	6
Spirett v. Willows	45
Spray, Goodwyn v.	29
Squire, Manaton v.	6
Stair's Policy, In re	39
Stamford, Earl of, v. Dawson	37
Stanley v. Wrigley	23
Stannard v. Lee	35
Steers, Bodycote v.	25
Steward v. Blakeway	43
Stokes v. Moore	40
Stone v. Stone	37
—— v. Thomas	37

	Page
Story v. Johnson	21, 22
Sturton v. Richardson	26
Styan, Wynne v.	3
Suggitt's Trusts, In re	45
Summers v. Griffiths	41
Swan v. Swan	10
Swann, Pascoe v.	27
—— v. Swann	27
Talbot v. Marshfield	38
Teale v. Watts	12, 13, 17
Thackeray v. Parker	19, 28
Thomas v. Dering	40
—— Hole v.	29
—— Stone v.	37
—— v. Thomas	27
Thorne, Cheesewright v.	35
Thorpe v. Holdsworth	39
Timmins, Morris v.	28
Tombs, Goodtitle v.	27
Topham v. Portland, Duke of	35
Totty, Jones v.	21, 22
Trick's Trusts, In re	42
Trigg v. Trigg	21
Trinders, Mullings v.	40
Trodd v. Downes	15
Tulloch v. Tulloch	35
Turner v. Marriott	41
—— v. Morgan	15, 19, 27
Turpin v. Chambers	40
Turvey, Davies v.	19
Twort v. Twort	29
Tyson v. Fairclough	29
Tyler v. Yates	41
Udall, Silver v.	17
Upperton v. Nicholson	40
Vane, Earl, v. Rigden	36
Waddingham, Pyrke v.	41
Wait, Baker v.	34
Walesby, Palmer v.	45
Walford v. Walford	35
Walker v. Seligmann	12
—— v. Ware, &c., Railway Company	41
Waller, Potter v.	10
Walrond, Speke v.	6
Walters, Hunter v.	38
Ward v. Ward	16
Ware, &c., Railway Company, Walker v.	41
Warmington, Miller v.	7
Warner v. Baynes	15, 19
Watney v. Wells	43
Watson v. Northumberland, Duke of	23
Watts, Teale v.	12, 13, 17
Wedmore v. Bristol, Mayor of	40
Wells, Watney v.	43
Whalley v. Dawson	5
Wharmby, Cuthbert v.	36
Wheeler v. Horne	26
White v. Herrick	43
—— v. Hillacre	39
Whittemore v. Whittemore	40
Whitton's Trusts, In re	42
Wilcox v. Marshall	39
Wilkinson's Estate, In re	37
Wilkinson v. Schneider	[illegible]
Williams, Brickenden v.	[illegible]
—— Gifford v.	11, 16, 17
—— v. Glenton	41
—— Goodess v.	9
—— v. Williams	28, 35
Willows, Spirett v.	45
Wills v. Slade	7, 10
Wood, Barnes v.	40
—— v. Boucher	42
—— v. Scoles	43
Woodhouse v. Woodhouse	37
Wood's Trusts, In re	42
Wright, Bowra v.	23
Wrigley, Stanley v.	23
Wyld, Cotton v.	40
Wynne v. Styan	3
Wythe v. Henniker	37
Yates, Tyler v.	41
Young, Richardson v.	38
—— Rowe v.	41

THE PARTITION ACT, 1868.

31 & 32 Vict. c. 40.

An Act to amend the Law relating to Partition.

[25th June, 1868.]

E it enacted by the Queen's most excellent Majesty, by
d with the advice and consent of the lords spiritual and
mporal, and commons, in this present Parliament as-
mbled, and by the authority of the same, as follows:

1. This Act may be cited as The Partition Act, 1868. Short title.

2. In this Act the term "the Court" means the Court As to the term "the Court." Chancery in *England*, the Court of Chancery in *Ireland*, e Landed Estates Court in *Ireland*, and the Court of ıancery of the County Palatine of *Lancaster*, within their spective jurisdictions.

3. In a suit of partition, where, if this Act had not been Power to Court to order sale instead of division. ıssed, a decree for partition might have been made, then it appears to the Court that, by reason of the nature of e property to which the suit relates, or of the number of e parties interested or presumptively interested therein, of the absence or disability of some of those parties, or any other circumstance, a sale of the property and a ribution of the proceeds would be more beneficial for parties interested than a division of the property between among them, the Court may, if it thinks fit, on the quest of any of the parties interested, and notwith-anding the dissent or disability of any others of them, rect a sale of the property accordingly, and may give all ecessary or proper consequential directions.

4. In a suit for partition, where, if this Act had not Sale on application of certain proportion of parties interested. een passed, a decree for partition might have been made, en if the party or parties interested, individually or llectively, to the extent of one moiety or upwards in the operty to which the suit relates, request the Court to rect a sale of the property and a distribution of the pro-eds instead of a division of the property between or among e parties interested, the Court shall, unless it sees good ason to the contrary, direct a sale of the property ac-rdingly, and give all necessary or proper consequential rections.

5. In a suit of partition, where, if this Act had not been As to purchase of share of party desiring sale. ssed, a decree for partition might have been made, then if y party interested in the property to which the suit re-tes requests the Court to direct a sale of the property and distribution of the proceeds instead of a division of the operty between or among the parties interested, the urt may, if it thinks fit, unless the other parties interested the property, or some of them, undertake to purchase the are of the party requesting a sale, direct a sale of the operty, and give all necessary or proper consequential rections, and in case of such undertaking being given the

Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

Authority for parties interested to bid.

6. On any sale under this Act the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to nonpayment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court seem reasonable.

Application of Trustee Act. (13 & 14 Vict. c. 60.)

7. Section thirty of The Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property.

Application of proceeds of sale. (19 & 20 Vict. c. 120.)

8. Sections twenty-three to twenty-five (both inclusive) of the Act of the session of the Nineteenth and Twentieth Years of Her Majesty's reign (chapter one hundred and twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this Act.

Parties to partition suit.

9. Any person who, if this Act had not been passed, might have maintained a suit for partition may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order.

Costs in partition suits.

10. In a suit for partition the Court may make such order a it thinks just respecting costs up to the time of the hearing.

As to General Orders under this Act. (21 & 22 Vict. c. 27.)

11. Sections nine, ten, and eleven of The Chancery Amendment Act, 1858, relative to the making of general orders, shall have effect as if they were repeated in this Act, and in terms made applicable to the purposes thereof.

Jurisdiction of County Courts in partition. (28 & 29 Vict. c. 99.)

12. In *England* the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this Act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of The County Courts Act, 1865.

PARTITION SUITS.

Co-ownership 3
Partition 3
Writ of Partition . . . 4
Jurisdiction in Equity . . 6
Plaintiff in Partition Suit . 7
Defendants 8
Bill or Plaint 11
Orders as to Title Deeds . . 13
Defences 15
Evidence at Hearing . . 17
Decree at Hearing . . . 17
Inquiries &c. under Decree . 18
Final Decree 18
Commission 19
Certificate of Commissioners . 22
Conveyances—Vesting Orders . 23
Partition in Chambers . . 24
Immediate Partition at Hearing 25
Sale 25
Accounts between Co-owners . 26
Directions as to Deeds . . 27
Costs 27
Injunction 28
Receiver 29

Co-ownership.] The position of co-owners is anomalous and embarrassing. Thus any one of several joint tenants or tenants in common can receive and give an effectual discharge for the entire rent (*a*), until the person making the payment receives notice from the others not to pay to one only, or if the land be not let he may occupy the whole and deal with it in any way that a prudent owner would adopt, as by cutting seasonable timber, or opening and working mines, and the only remedy for the others is to occupy with him. Inconvenience of co-ownership.

Partition.] The law of most civilized countries enables one of several co-owners to obtain either a partition of the common thing or a sale and division of the proceeds. In England, however, this right exists only where the common thing is land or an incorporeal hereditament capable of

(*a*) Wynne v. Styan, 2 Phill. 303.

No partition of chattels personal.

partition, and there is no judicial process by which a co-owner of a chattel personal can sever the common ownership or obtain an allotted share of the enjoyment of it (*b*). The only judicial mode by which a partition can now be obtained is by suit in a Court of Equity, and by the Partition Act 1868, (s. 12), the County Courts have jurisdiction in such suits in cases where the property to which the suit relates does not exceed £500 in value (*c*).

County Courts.

Writ of Partition.] Formerly there was in certain cases a mode of obtaining a partition at common law. This was by means of a real action commenced by the original writ *de partitione facienda.* In Littleton's time it was available only for parceners (*d*), on the ground, apparently, that all other co-owners must have become such by their own consent (*e*); but in 1539, by 31 Hen. 8, c. 1, a like remedy was given to joint tenants and tenants in common, having estates of inheritance in their own right or in right of their wives, and in 1540, by the 32 Hen. 8, c. 32, the same benefit was conferred upon joint tenants and tenants in common for life or years, and also in cases where some of the co-proprietors had particular estates while the others had estates of inheritance.

The original writ commanded the sheriff to summon the defendants, and after their appearance the demandant declared against them. He was required to state his own share and title, and also the shares, though not as it seems the distinct titles (*f*), of the defendants, and a variance be-

(*b*) Lit. s. 323. The Scotch law, following the Roman, gives a right of division or of sale and division of the sale monies in all cases. Brock v. Hamilton, 19 Milne, McPh. & Shaw, 701. The rule of Roman law is given in Cod. III., tit. 37, l. 5.—"*In communione vel societate nemo compellitur invitus detineri.*" And see Inst. IV., 17, § 5. The rules to be observed in effecting partition are given Dig. lib. X., tit. 3, and Code, lib. III., titt. 27 & 28.

(*c*) 31 & 32 Vict. c. 40, s. 12.

(*d*) Litt. s. 264.

(*e*) Bl. Comm. Bk. II., ch. 12.

(*f*) Per Sir S. Romilly *arguendo* in Agar v. Fairfax, 17 Ves 533.

tween the declaration and the proof was in general fatal.

The first judgment given directed a partition to be made, and upon this a writ was issued to the sheriff of the county in which the lands were situate, ordering him to go in his own person to the property taking a jury of twelve men with him, and there by the oaths of the jurors to allot separate shares of equal value to the respective parties. To this writ the sheriff made a return setting out by parcels the partition made by the verdict of the jury, under the seals of himself and the jurors, and after this the Court gave final judgment that this partition should be held firm and stable for ever (*g*). The judgment operated *per se* as a conveyance of the allotted shares to the parties in severalty (*h*).

This common law mode of proceeding seems never to have been very effectual. The preamble of the Act passed in 1697 (*i*), as to partition, states that "proceedings upon writs of partition are found by experience to be tedious, chargeable, and oftentimes ineffectual," and provides a remedy. It also enacts in substance that tenants of undivided parts shall be tenants of the parts allotted in severalty in respect of such undivided parts. But the difficulty under which the plaintiff at law remained of discovering all the persons interested, and even if he succeeded in this, of preserving evidence of the fact sufficient to satisfy a subsequent purchaser, added to the dilatoriness and highly technical character which the proceedings under the writ of partition shared with all other real actions, concurred in rendering even the improved proceedings very ineffica-

Inadequacy of remedy by writ of partition.

(*g*) Whalley v. Dawson, 2 Sch. & Lef. 372. A more detailed account of the proceedings under the writ of partition will be found in Booth's Real Actions (2nd edit.), 244. The forms of writs, counts, &c., are given in Rast. Entries, 447 *et seq.*; Coke's Entries, 409 *et seq.*

(*h*) Whalley v. Dawson, loc. cit.

(*i*) 8 & 9 Wm. 3, c. 31.

Origin of jurisdiction in Chancery.

cious (*k*). In fact the Court of Chancery had some time before the Act of William III., on what grounds in the first instance it is not very clear (*l*), assumed jurisdiction to decree partition, and the advantages afforded by its proceedings eventually drove the common law proceedings into complete desuetude.

The writ of partition after having enjoyed a shadowy half existence for more than a century was abolished in 1833 (*m*).

Jurisdiction in equity.] The jurisdiction of the Court of Chancery thus became established by reason of the difficulty and inadequacy of the common law remedy (*n*), and the Chancery proceedings as to the actual partition were originally formed upon the model of the common law proceedings, and still retain a considerable analogy

(*k*) See Ld. Red. on Eq. Pl., p. 120.

(*l*) The earliest reported case is Speke v. Walrond (1598), Tothill's Transactions in Chancery, tit. Partition. See too Martyn v. Perryman, 1 Chanc. Rep. 235 (1662), and Pyne v. Matthew, 3 Chanc. Rep. 29 (1669). In an action for partition at law, if one co-owner excluded the other and received the whole of the rents, or if he felled timber or dug stone, no relief could be had in the action, but separate actions of ejectment and for damages for the exclusion or waste must have been brought. But the Court of Chancery, in 1630, when it directed a partition gave also an account of the profits (Drury v. Drury, 1 Ch. Rep. 49), and after the introduction of the action of account against a tenant in common for taking more than his just share, by the 4 Anne, c. 16, s. 27, it gave an account of the rents even where there was no ouster (Lorimer v. Lorimer, 5 Madd. 363), and also an account of the produce of timber cut or stone dug by a tenant in common (Cooper v. Fisher, Seton on Decrees, 583). So in Manaton v. Squire, Freeman's Ch. Rep. 26, the suggestions of the bill are that some of the tenants in common had aliened their shares, so that the plaintiff did not know against whom to bring his writ of partition, and that other of the tenants in common did eat up all the profits, for which the plaintiff had no remedy at law. In some old precedents of bills for partition it is alleged that the defendant has possession of some of the common title deeds and refuses to deposit them with some indifferent person for the common benefit, and part of the prayer is that such title deeds may be deposited in Court for the benefit of all parties. Vanheythusen's Eq. Drafts., vol. 1, (2nd edit.), pp. 376 *et seq.*

See further as to the origin of the jurisdiction, Hargrave's note to Lit. s. 249; Story's Eq. Jur. Ch. XIV.

(*m*) By 3 & 4 Wm. 4, c. 27, s. 36.

(*n*) Agar v. Fairfax, 17 Ves. 533, 552.

o them. Leaving out of sight for the present ome modifications in practice not long intro- luced, the regular course of proceeding in a par- ition suit is by a bill filed by one of the co-owners gainst those whose interests in the property oincide with or overlap his. The decree orders a partition, and for this purpose directs that a commission shall be issued to certain commis- ioners to be named, who are required to divide nd allot the lands in severalty to the parties and n the shares mentioned in the decree, and the parties are to execute mutual conveyances of the egal estate in the respective shares, the equitable nterests being bound by the decree for partition.

General course in Chancery in partition suit.

Decree.

Under this decree a commission issues, usually o four practical land surveyors, who are required o go to and walk over the land and divide it ccording to the directions of the decree. This commission, it will be seen, supplies the place of he writ directed to the sheriff in the action at aw.

Commis- sion.

The foregoing sketch of the origin and grounds of the jurisdiction will render more intelligible he practical details which follow.

Plaintiff in partition suit.] A suit for partition nust be commenced by bill, or in the County Court, it is presumed, by plaint (*o*). The plaintiff nust have such an interest as entitles him to the present possession of a share. Thus, a co-owner of a reversion cannot file a bill for partition (*p*); nd on the other hand, a termor (*q*), or any owner of a particular estate (*r*) in a share, may maintain he suit. The bill or plaint must shew a co-owner- hip in the nature of co-parcenary, joint tenancy, or tenancy in common (*s*) between the plaintiff

Who may be plaintiff.

(*o*) No rules have been issued in the County Courts under the Partition Act, 1868.

(*p*) Evans v. Bagshaw, L. R. 8 Eq. 469, 5 Ch. App. 340.

(*q*) Baring v Nash, 1 Ves. & Bea. 551; Heaton v. Dearden, 6 Beav. 147; but see North v. Guinan, 1 Beatt. 342.

(*r*) Wills v. Slade, 6 Ves. 498; Hobson v. Sherwood, 6 Beav. 84; Gaskell v. Gaskell, 6 Sim. 643.

(*s*) Miller v. Warmington, 1 Jac. & Walk. 484, 493.

and one at least of the defendants (*t*). The ownership, however, need not be according to fixed aliquot parts, but it must be capable of being, at the time of partition, ascertained and estimated in arithmetical fractions. Thus, in *Agar* v. *Fairfax* (*u*), a piece of moor land was vested in trustees upon trust for the purchasers of certain farms in proportion to what should be the valuations of the farms whenever the moor should happen to be inclosed. In cases of this kind, where it appears that the plaintiff and other parties, one at least being a defendant (*v*), are entitled to the estate between them, but the shares are uncertain, the Court will, almost of course, direct an inquiry as to their respective interests, for that is for the common benefit of all; but a plaintiff who fails in shewing a title to any such interest as will entitle him to partition is not entitled as of right to an inquiry to enable him to complete his title, and the usual course is to dismiss his bill; but if the failure in the proof of the title is but small, the Court may, if it thinks fit, give him an opportunity of completing the title on an inquiry (*w*).

Infant plaintiff.

An infant may maintain a bill for a partition (*x*), but he must satisfy the Court that the decree is for his benefit (*y*).

Defendants.] The proper defendants to a suit for partition, or the persons to be served with notice of decree (*z*), if not made defendants at the hearing, are those and those only who would be necessary parties to a conveyance to the plaintiff of the portion of the estate to be allotted to him in lieu of his undivided share in the whole, and all persons

(*t*) See 31 & 32 Vict. c. 40, s. 9.
(*u*) 17 Ves. 533.
(*v*) See 31 & 32 Vict. c. 40, s. 9.
(*w*) Jope v. Morshead, 6 Beav. 213; Agar v. Fairfax (*loc. cit.*).
(*x*) Brook v. Ld. Hertford, 2 P. Wms. 518.
(*y*) See the decree in Brassey v. Chambers, 4 De G. M. & G. 528, 536.
(*z*) See 31 & 32 Vict. c. 40, s. 9.

having charges upon, or equitable interests in the shares of such necessary parties to the conveyance. The persons having equitable interests only are bound by the decree of the Court making the partition and the conveyance is only made by those having legal estates (*a*).

Equities bound by decree merely.

If the interest of the plaintiff be less than the fee-simple then the interests represented by the defendants or parties served must be at least equivalent to the plaintiff's interest. Thus a tenant for life or for years must make parties those whose interests in the other shares are at least equivalent (and that not only technically but actually) in quality and quantity to his. It will very often happen that this can only be done by parties whose estates make up the fee-simple. If the plaintiff is entitled in fee to a fourth, he must make parties all those who have particular estates or the first vested estates of inheritance in the remaining three-fourths, and all persons having interests carved out of such estates (*b*), and as an adult tenant in tail, of sound mind (*c*), can bar the entail, it is not necessary to make a party a person having a remainder subsequent to the estate tail.

Where plaintiff has a particular estate.

Share settled.

However, a living and ascertained person having a contingent remainder prior to the first vested estate of inheritance or an executory interest that may defeat it is a necessary party (*d*).

It is not necessary to make any one a party in respect of an interest which cannot come into possession until the expiration of the plaintiff's, so that a termor plaintiff is not obliged to make the

Reversioner of share.

(*a*) Anon. 3 Swanst. 139 n. This case is no doubt the same as Cartwright v. Pulteney, 2 Atk. 380.

(*b*) See Daniel's Ch. Prac. (5th edit.), pp. 187, 201, 230; Bat. and Lud. p. 17; Anon. 2 Eq. Ca. Abr. 166, pl. 8; Herring v. Hoe, 1 Atk. 290; Pyncent v. Pyncent, 3 Atk. 571; Cholmondeley v. Clinton, 2 Jac. & W. 133; Hopkins v. Hopkins, 1 Atk. 590; Ld. Red. 174.

(*c*) See Singleton v. Hopkins, 1 Jur. N. S. 1199.

(*d*) Ld. Red. 174; Goodess v. Williams, 2 Y. & Coll. Ch. Ca. 595.

Mortgagee of whole.

reversioner a party (*e*); and as a partition is merely an adjustment of the communion of rights, it is unnecessary and improper to make any one a party who has rights over the whole, as, for instance, a mortgagee of the entirety (*f*).

Parties not in esse.

Where a share is settled, a decree made in a suit to which the tenant for life is a party will bind persons who thereafter come into being and take under contingent remainders, or executory limitations (*g*).

Adverse claimants of shares.

The writ of partition was only available for and against those who were in actual possession (*h*); it could not, therefore, be brought by or against anyone who merely set up a claim unsupported by possession. In equity, it is said, a partition suit cannot be made the means of trying a disputed legal title (*i*), and this rule seems not to be affected by Sir John Rolt's Act (*k*). But it is clearly the duty of a plaintiff to constitute his suit in such a way as to give each defendant a title to a divided share, at least as good as that defendant has at the time of bill filed to his undivided share. A defendant may, therefore, insist that a claim having some colour of right to the share of another co-owner shall be disposed of in the suit before he accepts a conveyance which ignores it (*l*). It is, therefore, proper, though perhaps not in every case necessary, to make such claimants parties or statutory *quasi* parties to the suit (*m*). But such a claimant if out of possession, is not entitled, as a matter of right, to an inquiry as to his interest, and may be dismissed at the

(*e*) Baring v. Nash, 1 Ves. & Bea. 551.

(*f*) Swan v. Swan, 8 Price, 518.

(*g*) Gaskell v. Gaskell, 6 Sim. 643; Martyn v. Perryman, Rep. in Ch. 125; Wills v. Slade, 6 Ves. 498.

(*h*) Co. Lit. 167 a.

(*i*) Potter v. Waller, 2 De G. & Sm. 410, 417; Bishop of Ely v. Kenrick, Bunb. 322; Bolton v. Bolton, L. R. 7 Ch. App. 298, in notis.

(*k*) 25 & 26 Vict. c. 42, see s. 4.

(*l*) See and consider Lord Hardwicke's judgment in Cartwright v. Pulteney, 2 Atk. 380.

(*m*) See and consider Baring v. Nash, 1 Ves. & B. 551.

hearing, if the other parties consent (*n*). If the Court considers that his claim rested on no *probabilis causa*, he will not get costs (*n*), though he cannot be made to pay costs. A plaintiff out of possession and claiming under a legal title is not precluded from filing a bill for partition (*o*), although, as we shall see hereafter, the Court will in many cases not give him a decree until he has established his title at law (*o*); but a plaintiff in possession cannot, it is conceived, make a person a defendant, averring that such defendant sets up an unfounded claim to the plaintiff's share, for the defendant is entitled to choose his own time for bringing ejectment (*p*); and as a plaintiff in a partition suit is bound to show a clear title (*q*), the existence of such a claim may deprive him of the power of getting a partition. Dry trustees of a legal interest need not be parties to the suit (*r*).

Plaintiff out of possession.

Claim adverse to plaintiff in possession.

Dry trustees.

Bill or plaint.] The bill or plaint must shew the origin of the common title, and trace the devolution of the plaintiff's share with certainty and precision (*s*). But the interests of the defendants may be stated with less precision, as the plaintiff cannot in general be cognizant of their titles (*t*). If a defendant is out of possession, it must appear that he claims a share, or at least some interest in a share. Under the Partition Act, 1868, it is sufficient to have as defendant any one of the parties interested in order to obtain a decree for inquiries, but not, as we shall see hereafter, in order to obtain a decree for partition or sale. One of such inquiries, if only one of the parties

Defendants.

Inquiry as

(*n*) Backhouse v. Paddon, 14 W. R. 273, 13 L. T. N. S. 625.

(*o*) Giffard v. Williams, 5 L. R. Ch. App. 546, 8 L. R. Eq. 494; Slade v. Barlow, 7 L. R. Eq. 296; Bolton v. Bolton, there cited.

(*p*) Chir v. Philpott, 2 Vern. 743

(*q*) Baring v. Nash, 1 Ves. & B. 551; Cartwright v. Pulteney, 2 Atk. 380; Parker v. Gerard, Amb. 236.

(*r*) Cartwright v. Pulteney, *loc. cit.*

(*s*) Baring v. Nash, 1 Ves. & Bea. 551; Cartwright v. Pulteney, 2 Atk. 380.

(*t*) Baring v. Nash, *loc. cit.*

to parties interested.

interested is a defendant, must be who are the other parties interested (*t*), who must all eventually be served with a copy of the decree made against one party interested (*u*). The mode of ascertaining who are the parties interested, as, for instance, who are incumbrancers on the shares of the co-owners, or what interests are carved out of one particular share, must vary. Generally it will be necessary in the Court of Chancery to require an answer from the person or persons made defendant or defendants to the bill, to ascertain who, according to their knowledge, are the other parties interested. Therefore, if a share is suspected to be settled or incumbered it may be the more convenient course to make the primary owner of that share a defendant, and obtain by interrogatories a discovery of the other interests.

Answer when required.

Amendment.

It may also sometimes be desirable, on the answer coming in showing that other parties besides the persons made defendants to the bill are interested, to amend the bill by making such other persons parties; and in *Dodds* v. *Gronow* (*v*), where this was not done, the Court at the hearing directed the cause to stand over, with liberty to amend. After decree for an inquiry as to parties interested, persons served with notice of it are, by the 9th section of the Partition Act, 1868, not only to be "bound by the proceedings as if they had been originally parties to the suit"—as in the 42nd clause of the Chancery Amendment Act of 1852 (*w*)—but also to be "deemed parties to the suit," and it may be held that they are liable like other parties to be examined in Chambers, and to discover who are the parties interested. Any facts should be stated which tend to show that a sale rather than a partition should be decreed, or afford special ground for an account, or for the Court's interposition by injunction, by appointing a re-

Position of parties served with decree.

Special relief.

(*t*) 31 & 32 Vict. c. 40, s. 9.

(*u*) 31 & 32 Vict. c. 40, s. 9. Hurry v. Hurry, L. R. 10 Eq. 346; Teall v. Watts, L. R. 11 Eq. 213.

(*v*) 2 W. N. 1869, p. 66; 17 W. R. 511.

(*w*) See Walker v. Seligmann, L. R. 12 Eq. 152.

ceiver, or by ordering the deeds into Court. The prayer had better be framed as the final decree is wished to be. Inquiries necessary for obtaining the final relief, such as inquiries as to the nature of the property and the persons interested therein, will be, if necessary, directed without being specially asked for. Prayer.

If partition only is desired, of course it alone should be prayed for; but upon this prayer the Court may, on the application of a defendant, order a sale under sects. 3 and 4 of the Partition Act, 1868 (*x*). If a sale is desired it may be prayed for in the first place without asking for a partition (*y*); but it has not yet been decided whether such a prayer exposes the plaintiff to the liability of selling his share at a valuation if any defendant undertakes to buy it under the 5th section of the Act of 1868. Partition prayed. Sale prayed.

A prayer for an account of rents and profits, and for a receiver, should be added, and for an injunction if there is any reason to think that one may be required, since a receiver cannot be obtained on motion, or an injunction at all, unless prayed for (*z*). It will be desirable for a plaintiff not in possession of the title deeds, and having the largest share of the common property, or able to shew risk to the deeds from their present custody, to pray that the deeds and muniments of title may be brought into Court and dealt with as the Court shall direct; but this prayer must be founded on an allegation that the defendants have in their possession such title deeds. Account, receiver, injunction. Title deeds.

Orders as to title deeds.] It seems desirable to explain the object of this prayer as to title deeds.

The common order for production of deeds and documents relating to the matters in question Production before hearing.

(*x*) 31 & 32 Vict. c. 40, s. 5.

(*y*) Aston v. Meredith, L. R. 11 Eq. 601. Teall v. Watts, L. R. 11 Eq. 213, is probably misreported. The practice of asking for a sale in a mortgagee's bill, under 15 & 16 Vict. c. 86, s. 40, has always prevailed since Hutton v. Sealey, 4 Jur. N. S. 450, though the section speaks of suits for foreclosure only.

(*z*) Bat. & Lud. p. 15.

in the cause before the hearing is, that they are to be deposited in Court with the Clerk of Records and Writs (*a*). In the County Court no order for production can be obtained before the hearing (*b*).

Production in Chambers or office.

All decrees at the hearing in Chancery for accounts and inquiries used to direct the production of deeds and documents relating to such accounts and inquiries before the Master, and he had power under such a decree to direct them to be deposited in his office; and although this direction is not inserted in such decrees now, the Judge in Chambers has all the powers the Master had, and can in Chancery order the production of deeds and documents after decree, and, if necessary, direct them to be deposited in the Record and Writ Clerks' Office (*c*); and in the County Court the Judge may, after decree, order the production before the Registrar, and, if necessary, the deposit in his office, of all deeds and documents in the possession of the parties for the purpose of inquiries.

Production before commissioners.

In addition to these usual inquiries in a decree for partition, there is a direction that the parties shall produce "all deeds and writings relating to the estate" before the Commissioners of Partition: this was and is to give the Commissioners every assistance to be derived from the title deeds to make the partition (*d*), but it does not mean that all the deeds and documents which have been produced for purposes of discovery should be produced to the Commissioners, but only those which are muniments of title; and in the final order for partition, if there are any title deeds in the custody of any of the parties which relate to the portion of the lands allotted to one party jointly with those allotted to another, the practice

Final order as to title deeds.

(*a*) Seton on Decrees (3rd edit.), 1040.
(*b*) Bat. & Lud. p. 23.
(*c*) Consolidated Chancery Orders, XLII. 3.
(*d*) Lord Redesdale's opinion, Seton on Decrees (1st edit.), p. 192.

has been to direct that these title deeds shall be deposited in Court, that is, with the Clerk of Record and Writs, for the mutual benefit of both parties (*e*).

Another practice has also prevailed in the final decree, to direct the title deeds relating to two or more allotments to be delivered to the owner of the allotment of the greatest value, he entering into a covenant to produce them (*f*) to the owner of the allotment of less value. For these reasons it may be desirable to insert a prayer respecting the title deeds as suggested.

These directions for taking the title deeds in the possession of a party out of his custody when they relate to the property finally allotted to him, because they relate also to property allotted to another, and either depositing them in Court or giving them to the other party if his allotment is of the greatest value, are not in accordance with the decree in *Earl of Cardigan* v. *Montagu*, 1755, 'Seton on Decrees," 1st edit., p. 184, where the party in possession of such deeds was allowed to retain them, or with the order in *Jones* v. *Robinson*, 1853, 3 D. G. M. & G. 910, where Lord Justice Knight Bruce, although *Trodd* v. *Downes* was cited, asked, "What right has one tenant in common to take the deeds from the others if the latter has the possession?" At all events, this final order cannot apply to all the deeds and documents which the parties are bound to produce for the purpose of inquiries or of partition, but only to title deeds, surveys, and other muniments and evidences of title.

Defences.] On the subject of defences but little needs to be said. A decree for partition is a matter of right (*g*). And the expense, diffi-

(*e*) Trodd v. Downes (1742), Seton on Decrees (1st edit.), 188; Langton v. Burton (1854), Seton on Decrees (3rd edit.), 581; Collinson v. Collinson (1856), Seton on Decrees (3rd edit.), p. 572.

(*f*) Brooke v. Browne (1854), Seton on Decrees (3rd edit.), 586.

(*g*) Parker v. Gerard, Amb. 236; Warner v. Baynes, Amb. 589; Turner v. Morgan, 8 Ves. 143.

culty, or even ruinousness of effecting a partition is no bar, though these circumstances would influence the Court on the question of the propriety of ordering a sale and division in lieu of partition (*h*). The only defence therefore to any decree at all which seems to require mention is where the plaintiff asserts and the defendant denies a legal title, or a title which would be legal but for some outstanding dry legal estate. The defendant may in such a case, except perhaps where the question is merely as to the construction of a document under which both plaintiff and defendant claim (*i*), insist on the question being determined at law, and the course is, notwithstanding Sir John Rolt's Act (*k*), to retain the bill in order to enable the plaintiff to proceed at law (*l*). On the same principle, a person out of possession made a defendant on the ground of some legal claim which he makes to the share of a co-defendant may insist on a trial at law, if at the hearing it is considered necessary that his claim should be determined. But, as we have already seen (*m*), such a claimant may be dismissed at the hearing without prejudice to his rights (*n*), and, of course, if he disclaims, the plaintiff may be obliged to bear his costs (*o*). If, however, the question is not whether there shall be a decree at all, but whether the decree shall be for sale or partition, there may be much matter proper to be stated by way of defence (*p*),

Legal title denied by defendant.

(*h*) 31 & 32 Vict. c. 40, ss. 3, 4, 5.

(*i*) Bolton v. Bolton, L. R. 7 Eq. 298, in notis. See the judgment of L. J. Wood.

(*k*) 25 & 26 Vict. c. 42.

(*l*) Bolton v. Bolton, *loc. cit.*; Slade v. Barlow, L. R. 7 Eq. 296; Giffard v. Williams, L. R. 5 Ch. App. 546; Ward v. Ward, 18 W. R. 87. See also Mundy v. Mundy, 2 Ves. Jr. 122, 128.

(*m*) Ante, p. 10.

(*n*) See Backhouse v. Paddon, 14 W. R. 273, 13 L. T. N. S. 625.

(*o*) See next page. As to costs of disclaiming defendants, see Bat. & Lud. p. 42.

(*p*) Pemberton v. Barnes, W. N. 1871, p. 82, and on appeal, W. N. 1871, p. 168.

either to a sale if actually prayed for by the bill, or even if it is not prayed for, but the defendants apprehend it will be asked for at the hearing. Objections to sale.

Of course, if any of the special relief we have suggested is prayed for by the bill, any defence applicable to that relief should be set up, such as a settled account in answer to a prayer for an account, or the fact that the title deeds relate to property not the subject of the suit in answer to a prayer for a deposit of the title deeds in Court. Defence where special relief is prayed.

Evidence at Hearing.] The plaintiff's title must be proved or admitted at the hearing, and if the title he shews is materially defective his bill must be dismissed (*q*). It will be sufficient to shew that one of the defendants is a party interested (*r*). But, in such a case, the plaintiff must prove his title over again in Chambers or the Registrar's office, as the plaintiff in a creditor's suit does (*s*); otherwise two persons having no title might by collusion obtain a partition in the absence of the parties really entitled. The plaintiff will be allowed to supply in Chambers or in the Registrar's office a small or merely formal defect in title (*t*).

Decree at Hearing.] Except in the case where a party interested is out of the jurisdiction or cannot be found, and his interest is substantially represented, the Court will not decree a partition or sale in the absence of any party interested (*u*). So that unless all such parties are before the Court at the hearing, the decree then made can only direct inquiries as to the parties interested Where for inquiries only.

(*q*) Jope v. Morshead, 6 Beav. 213.
(*r*) 31 & 32 Vict. c. 40, s. 9.
(*s*) Bat. & Lud. 87.
(*t*) Jope v. Morshead, *loc. cit* ; Cartwright v. Pulteney, 2 Atk. 380; Baring v. Nash, 1 Ves. & Bea. 551; and see Giffard v. Williams, L. R. 8 Eq. 494.
(*u*) This seems the result of the present state of the authorities; see 31 & 32 Vict. c. 40, s. 9. Peters v. Bacon, L. R. 8 Eq. 125; Silver v. Udall, L. R. 9 Eq. 227; Hurry v. Hurry, L. R. 10 Eq. 346; Teall v. Watts, L. R. 11 Eq. 213; Dodds v. Gronow, 17 W. R. 511; Pennington v. Dalbiac, 18 W. R. 684.

Where for sale or partition.

and the nature and extent of their interests. It may, however, direct a partition or sale conditionally, on its appearing that all parties interested were parties to the suit at the hearing (*v*), and in order to avoid such inquiries it may, as we have seen, be desirable, on the answer coming in, to amend by adding parties, so that all persons interested should be parties before the Court at the hearing.

Inquiries, &c., under Decree.] We have already specified the circumstances under which the suit will at the hearing be ripe for an order for partition or sale. If this is not then the case, inquiries will be directed, and these must be prosecuted by the plaintiff. It will be his duty to obtain directions where necessary as to the insertion in proper newspapers of advertisements for parties interested (*w*), and to adduce evidence shewing who are the persons that ought to be served with a copy of the decree. When the inquiries directed by the decree are completed (*x*), the certificate will be prepared, and in due course approved, and after this has been done the cause may be set down for further consideration. We shall therefore now consider the course pursued when the cause is ripe for a decree for partition or sale, whether this happens at the original hearing or at the hearing on further consideration.

Advertisements.

Certificate.

Final Decree.] Except where the circumstances are such that the Court thinks it right to exercise the power given by the Act of 1868 (*y*), a plaintiff in a partition suit cannot obtain a sale of the common thing against the will of any party interested in a share and *sui juris*. Where all those who were *sui juris* desired a sale, the Court before the Act, in some cases by a circuitous device the validity of which has been doubted, managed to

(*v*) Lester v. Alexander, W. N. (1869) 75; Agar v. Fairfax, 17 Ves. 554; Seton on Decrees (2nd edit.), 311.

(*w*) See Peters v. Bacon, L. R. 8 Eq. 125.

(*x*) As to separate certificates see Bat. & Lud. p. 88.

(*y*) 31 & 32 Vict. c. 40.

ll the property (*z*), but the necessity for resort-
g to such a contrivance is superseded by the
ct just mentioned, and we shall not therefore
otice it.

Partition a matter of right.

Prior to the Act of 1868 each owner was
ntitled, as a matter of right, to insist upon a par-
tion, however difficult and disastrous it might
e, and although those who did not wish for a
artition were entitled to a much greater part of
ne property (*a*). This is now modified to some
xtent, as we shall see hereafter. Supposing,
owever, a partition to be directed, it was ac-

Mode of effecting partition.

ording to the old practice of the Court in almost
very case necessary to issue a commission of
artition. This proceeding is now to a great
xtent superseded by the practice recently intro-
uced of referring it to the Judge in Chambers
o make a partition, and as this course is in the
ourt of Chancery much less expensive than
suing a commission, it is there generally resorted
o. A County Court, however, in framing a pro-
edure analogous to that upon commissions of
artition would not be bound by the various
orms and expenses incident to this proceeding in
ne Court of Chancery, and there seems to be no
eason why in a County Court the cost of such
proceeding should be excessive, and there may
e cases in which a partition by Commissioners
isiting the spot will be more satisfactory than a
artition by the Registrar on the evidence of
thers. It is therefore thought desirable to
tate concisely the mode of proceeding by
ommission.

Commission.] It is essential that the shares

(*z*) See Davies v. Turvey, 32 Beav. 554; Thackeray v. Parker, N. R. 567.

(*a*) Parker v. Gerard, Amb. 236; Warner v. Baynes, Amb. 589, here a bath was partitioned; Turner v. Morgan, 8 Ves. 143, here a single house was divided by building up a wall. In orth v. Guinan, 1 Beatt. 342, Sir A. Hart refused to partition a asehold house on the ground that it was impossible to do so ithout committing waste, and thus rendering the lease liable to rfeiture. In all these cases a sale would no doubt now be dered.

should be ascertained in numerical fractions before the commission can issue, but where this depends on a question of fact only, the decree may direct a commission to issue, to allot the lands according to the shares to be ascertained by an inquiry (*b*). The commission (*c*) is sued out by the plaintiff or other party having the conduct. In Chancery it is sealed at the Record and Writ Clerks' Office. The names of the commissioners will be settled by the Judge in Chambers, or the Registrar, if the parties cannot agree, and the course is to appoint four. Even where all parties are content with two, there seems to be a practice in Chancery of making up the number by the names of two fictitious persons.

Duty of Commissioners.

For the purpose of making the partition, the authority of the Court is delegated to the commissioners. In fact they discharge the combined functions of the sheriff and jury under the old writ of partition. They must, therefore, sit as a Court, and take evidence, but only on such points as they think that evidence is required upon (*d*), in the presence of the parties, who are it seems entitled to examine and cross-examine in the regular way (*e*). The attendance of witnesses can be obtained by *subpœna* and notice as in the case of witnesses required to attend before the Examiner (*f*), or in the County Courts, it is conceived, by summons (*g*).

Evidence.

Attendance of witnesses.

The decree directs that all deeds and writings in the custody of any of the parties shall be produced before the Commissioners. The course of proceeding under it is to serve an indorsed copy of the decree upon the party having the document

Production of documents.

(*b*) Agar v. Fairfax, 17 Ves. 533.

(*c*) For further details as to the commission see Daniell's Ch. Prac. pp. 1023 *et seq.* (5th edit.), and Lord Redesdale's opinions on the commission in Curzon v. Lyster, Seton (1st edit.), 191; and for form of commission see Daniell's Forms, No. 1052.

(*d*) See Manners v. Charlesworth, 1 My. & K. 330.

(*e*) See Lord Redesdale's opinion in Curzon v. Lyster, Seton (1st edit.), 196.

(*f*) Daniell's Ch. Prac. 1024, 803 (5th edit.)

(*g*) Order III., r. 4.

required. The affidavit as to documents or the answer will often furnish the proof of the possession. If he then fails to produce it, he may be attached for contempt (*h*). In the County Courts, it is conceived, a summons should be served (*i*).

As the Commission directs the Commissioners to divide the "estates in question in the cause," their duty is to discover from the pleadings what the property is, and to refer to other documents noticed in the pleadings only so far as may be necessary to complete the description which they give. Documents or other evidence not connected with the pleadings are inadmissible (*k*). Duties of Commissioners.

As appears from the terms of the commission the partition ought to be made after a view of the property by the commissioners. But their return is looked upon as in the nature of an award of arbitrators, and will not be set aside except in case of misconduct, excess of authority, gross error of judgment, or clear mistake (*l*). In dividing an estate consisting of various particulars, *e.g.* a mansion-house, a park, and farm lands, it is not necessary to divide each particular, but the entire mansion-house may be given to one. All that is necessary is that all the divided parts should be of equal value (*m*). View. Return when set aside. Duties as to division.

In allotting the divided parts the Commissioners should take into consideration all the circumstances of the parties and the property; how far, for instance, one lot rather than another may be more convenient to one of the parties, by reason of its proximity to other land of his. So also on Allotment.

(*h*) Trigg v. Trigg, 1 Dick, 325. As to indorsement, see Order VII., Jan. 1870, r. 1; L. R. 5 Ch. App. xxxiii.

(*i*) Order III., r. 4.

(*k*) Lord Redesdale's opinion, Seton on Decrees (1st edit.), 194.

(*l*) Jones v. Totty, 1 Sim. 136; Manners v. Charlesworth, 1 My. & K. 330; Ames v. Commyns, 16 W. R. 74; Story v. Johnson, 1 Y. & C. Ex. Ca. 538.

(*m*) Earl of Clarendon v. Hornby, 1 P. Wms. 446; Lister v. Lister, 3 Y. & C. Ex. Ca. 540; Peers v. Needham, 19 Beav. 316.

a partition between co-heiresses they may, in assigning the lot comprising the family mansion, have regard to seniority, or to the circumstance that one of the co-heiresses is married and her husband has taken the family name. It is only in default of any circumstances to guide them they should resort to drawing lots (*n*).

Owelty of partition.

The Commissioners cannot, unless directed by decree, award sums for equality of partition (*o*). But it is often desirable to have such a direction inserted (*p*).

Certificate of Commissioners.] The Commissioners having made the allotments must prepare a certificate showing what they have done under the commission, and the depositions of the witnesses and any plans or documents referred to in the certificate or the depositions should be annexed (*q*). The commission and certificate are transmitted to the Record and Writ Clerks' Office and filed. The party suing out the commission, or on his default any other party, may then, on motion of course, obtain an order *nisi* to confirm the certificate, and, subsequently, if no cause is shown against the confirmation within the time limited, the order will, upon motion of course, be made absolute. If any party objects to the certificate, he must move upon notice to quash it (*r*).

Confirming or quashing certificate.

Commissioners divided.

The commission gives authority to the four Commissioners and "any three or two" of them. The meaning of this is, that if all four act three may make the return. If two only act their return is good, but if two make one certificate and the remaining two another, this return is not authorised, both certificates will be quashed and

(*n*) Canning v. Canning, 2 Drewry, 436; Story v. Johnson, 1 Y. & C. Ex. Ca. 538.

(*o*) Mole v. Mansfield, 15 Sim. 41.

(*p*) For form see Seton, 580 (3rd edit.).

(*q*) Daniell's Practice (4th edit.), Vol. III., No. 1060.

(*r*) See Seton (3rd edit.), 579, 583; Daniell's Practice (4th edit.), Forms Nos. 1062—1065; Jones v. Totty, 1 Sim. 136.

a new commission may be issued directed to five Commissioners (*s*). In the County Courts there seems to be no reason why two persons should not be named originally, with power to appoint an umpire to act in case they cannot agree.

Conveyances—Vesting Orders.] After the certificate is confirmed mutual conveyances of the legal estate must, as we have seen, be made by the parties which will be settled by the Judge in Chambers, or the Registrar of the County Court, if the parties differ, or if any party is under disability. Orders may be made under the Trustee Acts (*t*), declaring that a party is, or on coming into existence will be, a trustee of any legal right, whether vested or contingent, in the shares allotted to other parties, and vesting or directing some one to convey, or extinguishing the right accordingly (*u*). The direction to convey is often more convenient than a vesting order (*v*).

Shares numerous.

In *Sheppard* v. *Churchill* (*w*), where the shares were minute and complicated, the Court, though none of the parties were under disability, resorted to the Trustee Act in order to save the expense of making the parties all join in the conveyance. This was done by declaring each party a trustee for the others as to the shares allotted to the latter, then declaring that it was expedient to appoint one new trustee in lieu of these several trustees (*x*), and vesting the entire estate in such new trustee upon trust to convey to the several parties their allotted shares. The conveyance would thus be executed by one person only, viz., the new trustee. It would require the aid of the legislature to take the next step and empower the Court in all cases to make its decree operate as a

(*s*) Watson v. Duke of Northumberland, 11 Ves. 153; Corbet v. Davenant, 2 Brown's Ch. Ca. 252.

(*t*) As to which see Bat. & Lud. Ch. VII.

(*u*) 13 & 14 Vict. c. 60, s. 30; Bat. & Lud. p. 453; Bowra v. Wright, 4 De G. & Sm. 265; Stanley v. Wrigley, 3 Sm. & Gif. 20.

(*v*) See Seton (3rd edit.), p. 577.

(*w*) 25 Beav. 21.

(*x*) 13 & 14 Vict. c. 60, ss. 32 & 34; Bat. & Lud. 454.

conveyance, which it will be remembered was the effect of the decree at law. Still more desirable would it be to give to the decree of a Court of Equity making a partition the effect of an order of the Inclosure Commissioners for partition, by which (*y*) the land allotted in severalty upon partition in respect of each undivided part or share shall be and enure to, for, and upon the same uses, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the undivided part or share in respect whereof the same shall be allotted would have stood limited or been subject to in case the orders had not been made. Were such efficacy given by the legislature to the decree of the Court of Equity, the Court would very soon content itself with having before it a sufficient number of persons to represent all the interests in the property without having before it every person interested.

Partition by Inclosure Commissioners.

If any of the parties declared a trustee is a lunatic, application under the Trustee Acts must be made to the Lord Chancellor or the Lords Justices in Lunacy (*z*). The County Courts, therefore, will not have jurisdiction, but a petition may be presented in lunacy founded on the County Court decree, in the same way as was done in *Re Molyneux* (*a*), where the decree for partition had been made in the Chancery Court of Lancaster.

Sharer, lunatic.

Partition in Chambers.] The proceeding by commission of partition is now little adopted in the Court of Chancery. The more usual course is to refer it to the Judge in Chambers to make a partition, and liberty is sometimes given to any of the parties to lay proposals before him, and this even when one or more of the parties is under disability. The partition in Chambers must of course be made upon the evidence of surveyors or other competent persons, and it will be embodied

(*y*) 11 & 12 Vict. c. 99, s. 13.
(*z*) *Re* Bloomar, 2 De G. & Jo. 88.
(*a*) 4 De G. F. & Jo. 365.

a certificate in the usual way (*b*), and, it is con-
ived, may be varied in the usual way (*c*). When it
confirmed or has become absolute, the subsequent
roceedings will be the same as if the partition
ad been made by Commissioners.

Immediate Partition at hearing.] The Court may
it thinks fit make an immediate partition by
ecree at the hearing (*d*), even where infants are
ncerned. This is seldom done where an estate
as to be divided, but is the usual course in re-
rence to the partition of an advowson which is Advowson.
fected by assigning the parties presentations by
rns (*e*). Other subjects have been partitioned
a similar way, as a villein (*f*), and the right of
mpelling persons to grind their corn at a given
ill shortly called a mill (*g*). A manor can, it is Manor.
id (*h*), be partitioned by dividing the demesne
d the services, and it is also said that each
rcener will have a separate court for the part
lotted to each: this seems dubious, all that has
en decided is that a partition will be directed
a manor (*i*). But these cases will probably now
considered fit for a sale under the Act of 1868.

Sale.] The Partition Act of 1868 enables the
ourt to decree a sale and division of the pro-
eds instead of a partition. The fourth section
s been held to be retrospective (*k*), and the
ourt may, under the Act, sell part and partition
rt (*l*). We have already (*m*) referred to the

b) For form of certificate see Daniell's Forms, No. 1067.
c) As to course in County Courts, see County Court Orders,
8, VIII., rr. 3 & 4.
d) Greenwood v. Percy, 26 Beav. 572; Howard v. Barnwell,
. R. 172, merely decides that infants cannot be bound by the
nt of their counsel. The head note is incorrect. And see
rke v. Clayton, 2 Giff. 333; Brassey v. Chambers, 4 De G. M.
. 528.
e) Bodycote v. Steers, 1 Dick. 69; Seton, 586 (3rd edit.).
f) Coke upon Littleton, 164 b.
g) Earl of Clarendon v. Hornby, 1 P. Wms. 447.
h) Cattley v. Arnold, 4 Kay & J. 601.
i) Hanbury v. Hussey, 14 Beavan 152; Ley v. Cox, *ibid.*

k) Lys v. Lys, L. R. 7 Eq. 126.
l) Roebuck v. Chadebet, L. R. 8 Eq. 127.
m) *Ante*, p. 16; see note (*p*).

circumstances under which the Court will be likely to exercise or forbear from putting in force its power of selling. The mode in which the sale will be carried out differs in no way from that in which sales in Court are generally effected (*n*).

Application of purchase money.

The Act contains a provision (*o*) which enables the Court, in effecting a sale under it, to resort to the Trustee Acts (*p*), and incorporates (*q*) certain sections of the Leases and Sales of Settled Estates Act (*r*) under which the purchase money may either be paid into Court or to trustees, to hold or distribute presently, and, in the case of part of it being settled, such part may be invested and the dividends paid to the person entitled to receive them.

Accounts—Right to an Account.] The decree directing partition will in some cases also direct an account to be taken of the produce of the common property. It is, therefore, necessary to consider under what circumstances the account will be granted.

A defendant who has received more than his share of the rents or other returns (*s*) of the common property will, in the partition suit, have to account in the same way as he might be made to account at law in an independent action (*t*). Where, therefore, there has been no ouster he can be charged only with his actual receipts (*u*), unless he has been put into possession by the other co-owners as their bailiff, in which case he is chargeable with wilful neglect and default (*v*), and it must be remembered that any person entering upon the estate of an infant is charge-

Wilful default.

Infant.

(*n*) As to which, see Bat. & Lud. p. 36.
(*o*) 31 & 32 Vict. c. 40, s. 7.
(*p*) See Bat. & Lud., p. 278.
(*q*) By sect. 8.
(*r*) 19 & 20 Vict. c. 120, ss. 23, 24, 25. See Hayward v. Smith, W. N. (1869) 37.
(*s*) 4 Anne, c. 16, s. 27; and see Baxter v. Hozier, 5 Bing. N. C. 288.
(*t*) Henderson v. Eason, 2 Ph. 308; Lorimer v. Lorimer, 5 Madd. 363; Drury v. Drury, 1 Ch. R. 49.
(*u*) Sturton v. Richardson, 13 M. & W. 17.
(*v*) Wheeler v. Horne, Willes. 208; Co. Lit. 172 a.

able as the infant's bailiff (*w*). And he is not chargeable with an occupation rent (*x*), or with any profits which he has made by the use of the common property, as by farming at his own risk (*y*). If, however, he has while in possession repudiated the title of his fellow (*z*), or done any other act amounting to ouster, he is chargeable with an occupation rent (*a*). He is also, it is submitted, chargeable with the net produce of timber felled, and stone quarried, or coal or minerals got (*b*); whether with the produce of natural grass seems doubtful (*c*). But he is entitled to be allowed money expended in necessary repairs (*d*). Lasting improvements will be allowed against a co-tenant with whose approbation or acquiescence they have been made (*e*), and may be allowed by the Court as against an infant, charging a co-tenant as his bailiff (*f*).

Use and occupation.

Stone, timber, &c.

Repairs and improvements.

Direction in Decree as to Deeds.] It has been thought best to deal with the head of title deeds continuously. The reader is referred to what has been already said as to the directions inserted in the final decree (*g*).

Costs.] Prior to the Partition Act of 1868 the rule of the Court was that no costs were given up to the hearing, and the subsequent costs were borne by the parties interested in proportion to the value of their shares (*h*). But by sect. 10 of

(*w*) Morgan v. Morgan, 1 Atk. 489; Thomas v. Thomas, 2 K. & J. 79; Pascoe v. Swann, 27 Beav. 508.
(*x*) McMahon v. Burchell, 5 Hare. 322, 2 Ph. 127.
(*y*) Eason v. Henderson, 17 Q. B. 701.
(*z*) Doe d. Hellings v. Bird, 11 East, 49; Doe d Fisher v. Rosser, Cowper, 217; *Re* Peat's Trusts, L. R. 7 Eq. 388.
(*a*) Turner v. Morgan, 8 Ves. 145. See Goodtitle v. Tombs, 3 Wilson, 118; Pascoe v. Swann, 27 Beav. 508.
(*b*) See Martyn v. Knowlys, 8 T. R. 145; Cooper v. Fisher, Seton on Decrees, 583 (3rd edit.).
(*c*) Jacobs v. Seward, 4 C. P. & R. 328.
(*d*) Co. Lit. 200 b; Swann v. Swann, 8 Price, 518; Drury v. Drury, 1 Chan. Rep. 49.
(*e*) Swann v. Swann, 8 Price, 518
(*f*) Pascoe v. Swann, 27 Beav. 508.
(*g*) *Ante*, p. 13.
(*h*) Agar v. Fairfax, 17 Ves. 533; Morgan & Davey on Costs, p. 172.

the Act, the Court is authorised to deal with the costs up to the hearing, as it thinks just, and in the absence of special circumstances, the entire costs of the suit are now borne by the parties in proportion to their interests (*i*).

Where any of the parties interested in a share are under disability, the costs apportioned to that share may be declared a charge upon it. This has been done where a share belonged to a married woman restrained from anticipation (*k*), and where shares belonged to infants (*l*). In the case of a lunatic, such an order may be made in Chancery (*m*), and therefore by a County Court (*n*).

Married woman.
Infants.
Lunatic.

Where a defendant improperly disputes the plaintiff's title, he may be made to bear the costs occasioned by his unsuccessful opposition (*o*). But this does not apply to the case where a defendant in possession of the entirety merely puts the plaintiff claiming a share to proof of his title (*p*). So a defendant has been made to bear the costs occasioned by unsuccessfully setting up an agreement as a bar to partition (*q*).

Costs of adverse litigation.

Injunction.] In general one tenant in common will not be restrained from committing waste,

(*i*) Cannon v. Johnson, L. R. 11 Eq. 90; Osborn v. Osborn, L. R. 6 Eq. 338; Miller v. Marriott, L R. 7 Eq. 1. Landell v. Baker, L. R. 6 Eq. 268, has not been followed even by the Judge who decided it.

(*k*) Fleming v. Armstrong, 34 Beav. 109.

(*l*) Cox v. Cox, 3 K. & J. 554; Thackeray v. Parker, 1 N. R. 567.

(*m*) Singleton v. Hopkins, 1 Jur. N. S. 1199, 4 W. R. 107.

(*n*) The following cases as to costs were decided before the Partition Act, but they will now probably be very seldom referred to:—Williams v. Williams, 10 W. R. 609—purchaser of part of plaintiff's share made a defendant by amendment; Cornish v. Gest, 2 Cox, 27—where it was held that the costs of the lessee of an undivided share must be borne by his lessor; but this was denied in Herbert v. Hedges, 10 Ir. Eq. Rep. 174; Greer v. Mercer, 4 Ir. Eq. Rep 705, as to costs of legatees having legacies charged on a share, and of tenant for life.

(*o*) Hill v. Fullbrook, Jacob 574.

(*p*) Lyne v. Lyne, 21 Beav. 318; apparently the defendant was in possession of the whole.

(*q*) Morris v. Timmins, 1 Beav. 411.

even equitable waste, at the suit of another, unless it amounts to wanton destruction, such as cutting saplings and timber trees at unseasonable times (*r*), and the mere fact that a decree for partition or for sale has been made makes no difference (*s*). But under special circumstances such an injunction has been granted, as where the tenant committing waste had become occupying tenant of his fellow's moiety (*t*), or was insolvent (*u*).

Receiver.

In general where the estate is legal, a receiver will only be appointed of the whole in a partition suit, under circumstances which would justify the award of an injunction (*v*). But where the estate is equitable a receiver may be obtained against a tenant in common in possession, who receives the whole rent and excludes his companion from the share due to him (*w*).

(*r*) Goodwyn v. Spray, 2 Dick. 667; Hole v. Thomas, 7 Ves. 589; Arthur v. Lamb, 2 Dr. & Sm. 428.
(*s*) Bailey v. Hobson, L. R. 5 Ch. App. 180.
(*t*) Twort v. Twort, 16 Ves. 128.
(*u*) Smallman v. Onions, 3 Bro. C. C. 620.
(*v*) Norway v Rowe, 19 Ves. 143, 159; Tyson v. Fairclough, 2 Sim. & Stu. 142, 144; Searle v. Smales, 3 W. R. 437.
(*w*) Tyson v. Fairclough, 2 Sim. & Stu. 143.

A SUPPLEMENT

TO

A TREATISE

ON THE

Jurisdiction, Pleadings and Practice

OF

THE COUNTY COURTS

IN EQUITY.

BY

EDMUND CHISHOLM BATTEN, M.A.,

AND

HENRY LUDLOW, M.A.,

OF LINCOLN'S INN, ESQRS., BARRISTERS-AT-LAW.

LONDON:

WILLIAM AMER, LINCOLN'S INN GATE,

LAW BOOKSELLER AND PUBLISHER.

1872.

SUPPLEMENT

TO A

TREATISE ON THE COUNTY COURTS.

[*The cases include those published in November*, 1871.]

Page 1.]—County Court Acts were passed in 1866 and 67. The former (29 & 30 Vict. c. 14) abolishes the ices of High Bailiffs and Treasurers.

The County Courts Act of 1867 (30 & 31 Vict. c. 142), ntains several provisions dealing with the Equity juris-ction. Sect. 1 enables a plaint to be entered by leave the Court within the district of which a defendant relt or carried on business, within six months before e institution of the suit, or the cause of suit arose.* ct. 8 enables the Court of Chancery, on application, or *ro motu*, to transfer a suit to the County Court. See *card* v. *Hine*, 18 L. T., N. S., 705; *Maudesley* v. *Maudesley*, Ibid. 51. Sect. 9 extends the jurisdiction in ecific performance to agreements for a lease where the ue of the property does not exceed £500. By sect. , the County Court Judge may give costs where a ise is struck out for want of jurisdiction. Sects. 24-26 end the Trustees Relief Acts to the County Courts, is remedying the defect pointed out in pp. 264 *et seq.* sect. 27, the five Judges may direct that Equity pro-edings shall be commenced by summons. This power not been exercised. Sect. 29 contains a not very eligible provision as to *suits* unnecessarily brought an inferior Court, where the *verdict* recovered is for

* Sects. 8, 9, 24, 25 and 26 were remodelled on the motion of the late d Cranworth at the suggestion of one of the Authors.

less than £10. By sect. 34, the Act and other County Courts Acts are to be construed together, and cited by the short title—The County Courts Act 1846, 1849, 1850, 1852, 1856, 1858, 1859, 1861, 1866, 1867, respectively. By sect. 35 the London (City) Court is made a County Court. The schedule of enactments repealed includes the 128th section of the County Courts Act, 1846, so that the distance of the defendant's residence is now no reason for suing in the superior Courts.

Page 9.]—It has been held that the jurisdiction is concurrent.—*Scotto* v. *Heritage*, L. R. 3 Eq. 212.

But though full costs were in that case allowed to the plaintiff, mainly on the ground that the defendant resided more than twenty miles from him, it must be remembered that the exception in such a case, given by the County Court Act, 1846, sect. 128, is now abolished, this section being repealed by the County Court Act, 1867, sect. 33.

In *Simons* v. *M'Adam*, L. R. 6 Eq. 324, the plaintiff was only allowed such costs as he would have obtained in the County Court. See *Jesus College* v. *Bloome*, Amb. 54.

A suit as well as an action against an officer of the County Court may be brought in an adjoining district under the County Courts Act 1856, sect. 21, by force of the County Courts Act 1865, sect. 21, which is repeated in the County Courts Act 1867, sect. 34.—*Linford* v. *Gudgeon*, L. R. 6 Ch. App. 359.

Page 10.]—A case was transferred to the High Court of Chancery when the substantial defendant did not reside within the district of the County Court where the plaint was brought.—*Baker* v. *Wait*, L. R. 9 Eq. 103.

Page 10.]—After the transfer, the jurisdiction of the County Court is gone, and it cannot, therefore, make any order as to costs.—*Hare* v. *Lea*, L. R. 10 Eq. 684.

Page 17, note (*x*).]—Add *Furze* v. *Sherwood*, 3 M. & C. 96; *Nelson* v. *Seaman*, D. G. F. & J. 368.

Page 22.]—Under the joint operation of the County Court Common Law Rules, 1868, Nos. 76—82, and the County Courts Equity Order XXIII., 1868, rule 27, discovery may be obtained and documents ordered to be produced under the Equity jurisdiction, so far only, however, as under the Common Law jurisdiction.

Page 23, note (*z*).]—As to form of an affidavit as to documents after decree, see *Haldane* v. *Eckford*, L. R. 7 Eq. 425.

Page 27, note (*l*).]—Add *Hazell* v. *Currie*, L. R. 2 Ch. 449.

Page 30, line 18.]—After "and," add "in Chancery."

Page 31, line 7 from bottom.]—See *Tulloch* v. *Tulloch*, L. R. 3 Eq. 574.

Page 37.]—Opening biddings abolished, 30 & 31 Vict. c. 48.

Page 38, note (*z*).]—But see *Mullins* v. *Hussey*, L. R. 1 Eq. 481.

Page 41.]—A suit may be revived for costs if abated since 33 & 34 Vict. c. 28, see sect. 9.—*Doggett* v. *Eastern Counties Railway Company*, L. R. 6 Ch. 474.

Page 43, note (*r*).]—The ordinary rule now is, that the costs of the motion abide the result of the appeal.—*Burdick* v. *Garrick*, L. R. 5 Ch. 453, which practically overrules *Topham* v. *Duke of Portland*.

Page 44, line 1.]—Costs constitute a debt under the Debtors Act 1869.—*Hewitson* v. *Sherwin*, L. R. 10 Eq. 43.

The County Court Judge may append a note of the evidence to the case on appeal.—*Williams* v. *Williams*, W. N. (1868), 241.

Page 45.]—Application to stay proceedings pending appeal need not, as in Chancery, be made in the first instance to the Court below.—*Cheesewright* v. *Thorne*, W. N. (1869), p. 81.

Note (*f*).]—Add *Barrs* v. *Fewkes*, L. R. 1 Eq. 392; *Walford* v. *Walford*, L. R. 3 Ch. 12.

Line 8 from bottom.]—Decided accordingly, but appeal given by County Courts Act 1867, sect. 32.

Page 46, note (*o*).]—The present Appeal Court in Chancery has restored the old rule unless the respondent has been guilty of misconduct.—*Denny* v. *Hancock* (*No.* 2) L. R. 6 Ch. 138; *Stannard* v. *Lee*, Ibid. 34. So the Chief Judge on appeal in Bankruptcy.—*Ex parte Matthews*, W. N. (1871), 174.

ADMINISTRATION SUITS.

Page 53, note (*c*).]—Add *Garner* v. *Briggs*, 27 L. J. N. S. Ch. 483.

Page 54, note (*g*).]—A residuary devise was held to be specific by Lord Chelmsford.—*Hensman* v. *Fryer*, L. R.

3 Ch. 420; followed by V. C. Malins in *Gibbins* v. *Eyden*, L. R. 7 Eq. 371, 375; and see *Powell* v. *Riley*, L. R. 12 Eq. 175.

Page 59, note (*a*).]—A pledge of the assets to a creditor is as valid as payment.—*Earl Vane* v. *Rigden*, L. R. 5 Ch. App. 663.

Note (*x*).]—See *Isaacson* v. *Harwood*, L. R. 2 Ch. 225; *Holland* v. *Holland*, L. R. 4 Ch. 449.

Note (*a*).]—*Executor de son tort* may plead settled account with executor or administrator.—*Hill* v. *Curtis*, L. R. 1 Eq. 90.

Page 73.]—As to portions, see *Campbell* v. *Campbell*, L. R. 1 Eq. 383; *Knapp* v. *Knapp*, L. R. 12 Eq. 238.

Page 74, note (*o*).]—Add *Burdick* v. *Garrick*, L. R. 5 Ch. 238. The reference to *Hope* v. *Fox* is 1 J. & H. 54.

Note (*t*).]—A legacy to keep up a tomb in a church was held to be good.—*Hoare* v. *Osborne*, L. R. 1 Eq. 585. So to put up and keep in repair a memorial window in the church.—*S. C.*

Page 78.]—A party having a contingent interest only in the residue cannot maintain a suit to administer.—*Davis* v. *Angell*, 31 Beav. 228.

Note (*u*).]—See *Brittlebank* v. *Goodwin*, L. R. 5 Ch. 545.

Page 87.]—If advertisements under 22 & 23 Vict. c. 35 have been issued, new ones need not be issued.—*Cuthbert* v. *Wharmby*, W. N. (1869), p. 12.

Note (*b*).]—A legacy to an infant from a stranger with an express direction that the income shall be for its maintenance, carries interest from the testator's death.—*In re Richards*, L. R. 8 Eq. 119.

Page 90.]—In the administration of the estates of persons dying after the 31st of December, 1869, there is no distinction made between specialty and simple contract creditors. (32 & 33 Vict. c. 46, sometimes called Hinde Palmer's Act.)

Page 91.]—As to assets arising from execution of power, see *Brickenden* v. *Williams*, L. R. 7 Eq. 310, where the donee of the power was a married woman.

Page 92, after (3) add,]—This does not seem to include an equity of redemption in either freehold.—*In re Handley*, 1 Sim. N. S. 200; or copyhold estates, *Burrell* v. *Smith*, L. R. 9 Eq. 443.

Page 93, note (*h*).]—So if unpaid vendor is paid out of personal estate, legatees are entitled to stand in his place against the estate sold by him.—*Lord Lilford* v. *Powys Keck*, L. R. 1 Eq. 347, overruling *Wythe* v. *Henniker*, 2 My. & K. 635.

Page 96, note (*a*).]—See *Henderson* v. *Dodds*, L. R. 2 Ch. 532.

EXECUTION OF TRUSTS.

Page 99.]—Constructive trusts included.—*Clayton* v. *Renton*, L. R. 4 Eq. 158, but see *Earl of Stamford* v. *Dawson*, ibid. 352.

Page 100, note (*d*).]—Add *Stone* v. *Stone*, L. R. 5 Ch. 74.

Page 103, note (*a*).]—It appears that Vice Chancellor Giffard thought that if this voluntary settlement is fraudulent against a prior debt the conveyance cannot be set up *pari passu*, but is gone.—*Adames* v. *Hallett*, L. R. 6 Eq. 470.

Page 106.]—The Court of Chancery finally decided it would not in ordinary circumstances execute the trusts of a creditors' deed registered under the Act of 1861 —*Martin* v. *Powning*, L. R. 4 Ch. 156; except in aid of Court of Bankruptcy—*Riches* v. *Owen*, L. R. 3 Ch. 820, *Stone* v. *Thomas*, L. R. 5 Ch. 219; but the Act of 1861 being repealed, if a creditors' deed is not treated as an act of bankruptcy, the jurisdiction in Chancery or the County Court to execute such trusts seems to be restored.

Note (*s*).]—Now six months. Bankruptcy Act, 1869, sect. 6.

Page 120.]—Trustees are now authorised to invest in New East India Stock and in stocks guaranteed by Parliament.—See *In re Wilkinson's Estate*, L. R. 7 Eq. 343.

Page 123.]—The executor of a trustee can no more avail himself of the statute than his testator.—*Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545.

Note (*c*).]—Add *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 544.

Page 128.]—A trustee as to money which has at any time been actually under his control, is excepted from the

Debtors Act, 1869, by subs. 3 of sect. 4.—*Myddleton* v. *Chichester*, L. R. 6 Ch. 152.

Page 126, note (*v*).]—Add *Graham* v. *Graham*, 16 Beav. 550.

Page 134, note (*v*).]—But a defaulting trustee is entitled to costs since his bankruptcy, *Bowyer* v. *Griffin*, L. R. 9 Eq. 340.

Page 135, note (*n*).]—Add *Talbot* v. *Marshfield*, L. R. 3 Ch. 622.

FORECLOSURE AND REDEMPTION.

Page 139.]—The County Court has jurisdiction in foreclosure, although the right to redemption is disputed. —*Powell* v. *Roberts*, L. R. 9 Eq. 169.

Page 142.]—As to deposit by a trustee to secure his own debt, see *Newton* v. *Newton*, L. R. 6 Eq. 135.

Page 144.]—The 27 & 28 Vict. c. 112 is difficult of construction. The following cases have been decided upon it. *In re Cowbridge Railway Company*, L. R. 5 Eq. 513; *Guest* v. *Cowbridge Railway Company*, L. R. 6 Eq. 619, 37 L. J. (N. S.) Ch. 909. *In re Duke of Newcastle*, L. R. 8 Eq. 700; 39 L. J. (N. S.) Ch. 68. *Mildred* v. *Austin*, L. R. 8 Eq. 220. *In re Calne Railway Company*, L. R. 9 Eq. 658.

Page 148.]—As to Bills of Sale, see now 29 & 30 Vict. c. 96.

Page 158.]—Locke King's Act, extended by 30 & 31 Vict. c. 69.

Page 163, note (*c*).]—Add *Hunter* v. *Walters*, L. R. 11 Eq. 292.

Page 164, note (*f*).]—*Carter* v. *Carter* is disapproved in Dart's V. & P. (4th edition), p. 758, but approved and followed in *Pilcher* v. *Rawlins*, L. R. 11 Eq. 53 (M. R.). [Now under appeal.]

Page 160.]—A release of the equity of redemption will be set aside if the mortgagee has taken advantage of the necessities of the mortgagor.—*Ford* v. *Olden*, L. R. 3 Eq. 461.

Page 161.]—An acknowledgment by one of two joint mortgagees known to be trustees has no effect.—*Richardson* v. *Young*, L. R. 6 Ch. 468.

Page 163.]—Things in action other than trade debts

are no longer deemed goods and chattels within the order and disposition clause of the Bankruptcy Act, 32 & 33 Vict. c. 71, s. 15, sub. 5; but see *In re Jackson*, L. R. 12 Eq. 354.

Page 170.]—As to the right of a second mortgagee to retain title deeds, see *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139.

Page 171.]—In case the sale proves abortive the deposit may be applied to indemnify the first mortgagee.—*Corsellis* v. *Patman*, L. R. 4 Eq. 156.

Page 173.]—First mortgagee cannot take a decree for foreclosure until the priorities amongst the subsequent incumbrancers are ascertained, *Duberly* v. *Day*, 14 Beav. 9; but he may take a decree for sale, only one day being given to all subsequent mortgagees to redeem, see *Beevor* v. *Luck*, L. R 4 Eq. 545.

Page 179, note (*w*).]—*White* v. *Hillacre* is practically overruled by *Beevor* v. *Luck*, L. R. 4 Eq. 545, and the rule of consolidation applies equally against a purchaser or a mortgagee.

Note (*y*).]—Add *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501.

Page 180.]—A debt secured by mere deposit carries interest at 4 per cent.—*In re Stair's Policy*, L. R. 8 Eq. 131.

SPECIFIC PERFORMANCE.

Page 195, note (*l*).]—But if the valuation refer only to some subordinate item, the rest of the contract may be enforced.—*Richardson* v. *Smith*, L. R. 5 Ch. 648.

Page 196, note (*o*).]—But this rule does not extend to the remedy under a covenant for quiet enjoyment in a lease, on eviction by person claiming under lessor.—*Locke* v. *Furze*, L. R. 1 C. P. 441.

Page 196, note (*p*).]—Or a refusal to do what might be reasonably done.—*Robinson* v. *Harman*, 18 L. J., Ex. 202; *Engell* v. *Fitch*, W. N. (1868) 107.

Page 198.]—Specific performance of an agreement to sell a share in a partnership was decreed in *Homfray* v. *Fothergill*, L R. 1 Eq. 567. See County Courts Act, 1867, *supra*, p. 33, as to an agreement to lease, and *Wilcox* v. *Marshall*, L. R. 3 Eq. 270.

Page 199, note (*m*).]—*Thomas* v. *Dering* overruled *Barnes* v. *Wood*, 2 L. R. 3 Eq. 424.

Page 207.]—It is not necessary to pray for damages specifically.—*Wedmore* v. *Mayor of Bristol*, 11 Jur. 131. It comes under the prayer of further relief.—*Cotton* v. *Wyld*, 32 Beav. 267.

Page 210.]—Accordingly *Caton* v. *Caton*, in D. P., L. R. 2 Eng. & Ir. App. 127, follows *Stokes* v. *Moore*, and considered the introduction of the names not a sufficient signature under the circumstances.

Page 210, note (*y*).]—Add *Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 678.

Page 213, note (*o*).]—The principle applies where the purchaser's notice is only constructive.—*James* v. *Lichfield*, L. R. 9 Eq. 51.

Page 214, note (*u*).]—Add "even though a right to bid is reserved under the Auctions Act."—*Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.

Page 214.]—The contract will not be enforced if the particulars of sale are framed so as to mislead the purchaser.—*Baskcomb* v. *Beckwith*, L. R. 8 Eq. 110; *Denny* v. *Hancock*, L. R. 6 Ch. 1. The usual condition protecting the vendor against errors applies only to small errors.—*Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

Page 217, note (*s*).]—But a judgment creditor is not such a purchaser.—*Dolphin* v. *Aylward*, L. R. 4 E. & I. App. 495.

Page 218.]—As to what constitutes a doubtful title see *Mullings* v. *Trinders*, L. R. 10 Eq. 449, and *Alexander* v. *Mills*, L. R. 6 Ch. 124.

Page 220, note (*t*).]—In the usual inquiry as to title, "good" means "good according to the contract."—*Upperton* v. *Nicholson*, L. R. 6 Ch. 436.

Page 221.]—Where there is no question but that of title, a vendor refusing to consent to a reference as to title before hearing ought, according to the Lords Justices, in any event to pay the costs up to the hearing.—*Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

Page 221, note (*u*).]—Add *Hoy* v. *Smithies*, 22 B. 510; *Turpin* v. *Chambers*, 29 B. 104; *Duddell* v. *Simpson*, L. R. 1 Eq. 578, L. R. 2 Ch. 104.

Page 224.]—It appears that if the purchaser is not likely to pay the vendor, the vendor, as plaintiff, may ask

for a declaration of lien, and for a re-sale.—*Walker* v. *Ware, &c., Railway Company*, L. R. 1 Eq. 195, as well as for specific performance; this was done where the purchaser became bankrupt, *Bowles* v. *Rogers*, 6 Ves. 95, where he had died, *Popple* v. *Henson*, 5 D. G. & Sm. 318. So, apparently without any special ground of inability, in *Rowe* v. *Young*, 3 Y. & C. 199.

Page 226, note (*u*).]—Add *Williams* v. *Glenton*, 34 B. 535.

Page 228, note (*n*).]—And this deposit and interest, and the costs of the suit, may be declared a lien upon the estates contracted to be sold.—*Middleton* v. *Magnay*, 2 H. & M. 233; *Turner* v. *Marriott*, L. R. 3 Eq. 745.

Page 229.]—A receiver will be appointed to enable an unpaid vendor to realize his lien against a Railway Company.—*Munns* v. *Isle of Wight Railway Company*, L. R. 5 Ch. 414.

Page 230, note (*b*).]—See *Pope* v. *Great Eastern Railway Company*, L. R. 3 Eq. 171.

Page 232, note (*y*).]—See *Pyrke* v. *Waddingham*, 10 Ha. 1.

CANCELLATION OF AGREEMENTS.

Page 241, note (*l*).]—*Haywood* v. *Cope*, 25 Beav. 140.

Page 245, note (*m*).]—See *Summers* v. *Griffiths*, 35 Beav. 7, *suppressio veri* by a purchaser.

Page 250, note (*l*).]—31 & 32 Vict. c. 4 has done no more than throw the onus of proving the unfairness of the bargain on the seller.—*Miller* v. *Cook*, L. R. 10 Eq. Unfair rate of interest, see *Tyler* v. *Yates*, L. R. 11 Eq. 75.

TRUSTEE RELIEF ACTS.

Page 267, note (*h*).]—Add *Re Smith's Mortgage*, 7 Jur. N. S. 903.

Page 268, note (*o*).]—And the Court cannot act under the statute, but can only pay it back again to the party paying it in.—*In re Joseph's Will*, 11 Beav. 625.

Page 270.]—Instead of the reference to Consolidated Order XLI., r. 8, insert County Court Order XI., r. 17.

Page 271.]—As to costs, see Order XI. r. 18. The Court in distributing the fund may act upon a deed, as it would be rectified on bill filed.—*In re De La Touche's Settlement*, L. R. 10 Eq. 599.

Page 273, note (*k*).]—An executor having the general residue in his hands may be ordered to pay the costs of a petition out of it.—*In re Trick's Trusts*, L. R. 5 Ch. 170.

Page 273, note (*m*).]—*In re Marner's Trust*, L. R. 3 Eq. 452; *In re Gordon's Trust*, L. R. 6 Eq. 335; *In re Whitton's Trusts*, L. R. 8 Eq. 353; *In re Mason's Trusts*, L. R. 12 Eq. 112; and consider County Courts Order, XI. r. 17.

Page 273, note (*n*).]—See *In re Smith's Trusts*, L. R. 9 Eq. 374, and *Re Wood's Trusts*, L. R. 11 Eq. 155.

Page 273, note (*y*).]—*Beaty* v. *Curzon*, L. R. 7 Eq. 194. The Court on bill filed compelled a trustee to refund excessive costs deducted.

Page 274, note (*t*).]—*Wood* v. *Boucher*, L. R. 11 Ch. 77, substantially adopts the suggestion in the text. See, too, *In re Duggan's Trusts*, L. R. 8 Eq. 697.

Page 276, Sec. III.]—The heading of Form 20 is not repeated in the Orders of 1868.

THE TRUSTEE ACTS, 1850 & 1852.

Page 278.]—*In re Joyce's Estate*, L. R. 2 Eq. 576, an assignee in bankruptcy, who had gone abroad, was held a trustee within the Trustee Act.

Page 279.]—Where the legal estate is vested in a per son of unsound mind not so found, a vesting order may be made by the County Court under the Trustee Act 1852, s. 1.—*Herring* v. *Clark*, L. R. 4 Ch. 167.

Page 279.]—A vendor of copyholds by receiving the purchase money and covenanting to surrender becomes a trustee.—*In re Cuming*, L. R. 5 Ch. 72.

Page 285.]—New trustees of a creditors' deed may be appointed under Trustee Acts.—*In re Rice's Trust Deed* L. R. 6 Eq. 460.

Page 287.]—An order may be made under sect. 32 where a person having power to appoint a new trustee is a lunatic.—*Re Sparrow*, L. R. 5 Ch. 662.

Page 287.]—Where the sole trustee appointed by a ill predeceases the testator the Court cannot appoint a ew trustee in the absence of the heir.—*Gunson* v. *Simpson*, . R. 5 Eq. 332. *Secus*, he being served.—*Re Smirthwaite's Trusts*, L. R. 11 Eq. 251. In a suit the Court has in-erent power to appoint trustees though none were riginally appointed.—*Dodkin* v. *Brunt*, L. R. 6 Eq. 80; and see *Re Davis Trusts*, L. R. 12 Eq. 214.

MAINTENANCE AND ADVANCEMENT.

Page 295, note (*g*).]—*In re Graham*, L. R. 10 Eq. 530, Malins V. C. held that an order for maintenance made on ummons constituted the infant a ward of Court.

As to guardian *ad litem* in County Court, see County Court Rules (Com. Law), 116, and Orders in Equity, XXIII. r. 27.

Page 296.]—As to the religious education of wards, ee *In re Newbery*, L. R. 1 Eq. 431, 1 Ch. 263; *Hawks-worth* v. *Hawksworth*, L. R. 6 Ch. 539.

Page 296, note (*p*).]—Where a ward married the day fter she came of age a settlement was not ordered. —*White* v. *Herrick*, L. R. 4 Ch. 345.

Page 300, note (*c*).]—Add *Ransome* v. *Burgess*, L. R. 3 Eq. 773.

Page 301.]—As to advancement by setting up in trade, ee *Re Kershaw's Trusts*, L. R. 6 Eq. 322.

PARTNERSHIP.

Page 296, note (*a*).]—Add *Nowell* v. *Nowell*, L. R. 7 Eq. 538.

Page 304, note (*f*).]—Add *Steward* v. *Blakeway*, L. R. 6 Eq. 479.

Page 315, note (*h*).]—*Miller* v. *Miller*, L. R. 8 Eq. 499, s inconsistent with *Martin* v. *Heathcote*, which, however, vas not cited.

Page 323.]—As to mode of taking partnership ac-ounts on a dissolution, see *Wood* v. *Scoles*, L. R. 1 Ch. 369; *Nowell* v. *Nowell*, L. R. 7 Eq. 538; *Watney* v. *Wells*, L. R. 2 Ch. App. 250; *Dinham* v. *Bradford*, L. R. 5 Ch. 519, where an agreement to sell a share by arbitration vas enforced though no award had been made.

Page 324.]—Where interest is stipulated for on capital, undivided profits do not carry interest.—*Dinham* v. *Bradford*, L. R. 5 Ch. 519.

Page 325, note (*w*).]—Add *Atwood* v. *Maude*, L. R. 3 Ch. 369.

ORDERS AND FORMS.

Page 337.]—These orders and forms have been formally abrogated, but, with few exceptions, repeated *verbatim* in the present orders and forms which came into operation on the 1st of January, 1868. The additions and alterations are here noted. No orders or forms have yet been issued under the Partition Act.

Order 1, rule 1, line 1, dele 4th, and in line 2, after "Act," add, "and under the 9th section of 30 & 31 Vict. c. 142."

Page 349.]—In title of Order XI., after "section," add "of the Act and section 24 of 30 & 31 Vict. c. 142." In present Order XI. there is a mistake in numbering, there is no rule 5, rule 4 is followed by new rules 6—19, regulating the procedure under the Trustees Relief Acts, and the old rules 5—10 are now numbered 20—25.

Page 351.]—Order XII. rule 3. See rule 5 of present Order XVI. carrying out suggestion in note.

Page 351.]—Order XIII. The last paragraph now stands thus:—"And the rules relating to amendments in actions shall apply, so far as they are applicable, to all suits and proceedings in equity."

The County Courts Rules of 1857, which are printed, bear in the present rules the numbers 119—128.

Page 355.]—The omission pointed out in the note to Order XVI. rule 4 (which note may now be cancelled) is remedied in the rules 5 and 6 of the present Order XVI. and by the present forms in Equity, 41—47. But as to form 47, it is conceived that a person who has purged his contempt cannot now as a general rule be detained for costs (32 & 33 Vict. c. 62. s. 4.) As to contempt by a married woman, see *Hope* v. *Carnegie*, L. R. 7 Eq. 254, 263.

Page 358.]—Rules 1—5 of Order XVII. are abrogated, and six new rules substituted. Rules 6—8 become rules 7—9 of the new Order XVII.

Page 359.]—Rule 8. The wife cannot assert an equity a settlement until her debts before marriage are ovided for, *Barnard* v. *Ford*, L. R. 4 Ch. App. 247, d see now 33 & 34 Vict. c. 93, s. 12. As to sums der £200, see 33 & 34 Vict. c. 93, s. 7.

As to the form of settlement made by the Court, see *irett* v. *Willows*, L. R. 1 Ch. App. 520, 4 Ch. App. 407, d as to amount settled, *In re Suggitt's Trusts*, L. R. 3 . App. 215, both which cases are observed upon by mes, V. C., in *Croxton* v. *May*, L. R. 9 Eq. 404.

Page 360.]—Where the husband is permanently sident abroad an affidavit of the wife alone is it ems sufficient.—*Wilkinson* v. *Schneider*, L. R. 9 Eq. 431.

Page 362.]—Rules are added to Order XVII. re- lating the practice in the case of suits transferred to e County Court from the Court of Chancery under ct. 8 of 30 & 31 Vict. c. 142.

Page 365.]—A rule (rule 9) is added to Order XX. as the Registrar's duty in reference to the custody of curities, and an Order of May, 1870, requires the gistrar to see that legacy and succession duties are id on funds under the control of the Court.

Page 369.]—As to a person assuming to act as next end of a person untruly alleged to be *non compos*, *Palmer* v. *Walesby*, L. R. 3 Ch. App. 732.

Page 370.]—An additional rule (rule 25) in the present der XXIII. provides that "Any person in custody may ply to the Registrar for his discharge therefrom upon ing to the party at whose suit he was committed tice of his intention so to apply two days previous to applying." Rules 25 and 26 now bear the numbers and 27.

Page 370.]—Another rule, added in May, 1870, vides, "The fee on service of process shall be taken in pect of each defendant to be served, and where the cess is to be served in a foreign district, a fee for each davit of service."

Page 405.]—A new scale of costs is annexed to the lers of 1868.

INDEX.

ABSENCE of party in partition, 17.
ACCOUNT, prayer for, 13.
defence to, 17.
settled, 36.
ACCOUNTS of produce of common property, 26.
ACTION, when necessary before partition, 11.
ADMINISTRATION, 35, 36.
interest of plaintiff, 36.
ADVANCEMENT of infants, 43.
ADVERSE claimants of share, 10.
of plaintiff's share, 11.
litigation, costs of, 28.
ADVERTISEMENTS for creditors, 36.
when necessary in partition, 18.
ADVOWSON, partition of, 25.
AFFIDAVIT as to documents, 35.
of no settlement, 45.
AGREEMENT for lease, 33.
ALLOTMENT, more convenient to one party, 21.
rights as to deeds after, 15.
under commission of partition, 21.
AMENDMENT of bill for partition, 12, 18.
AMENDMENTS, 44.
ANSWER, when required in partition, 12.
APPEAL, 35.
costs of, successful, 35.
motion to stay pending, 35.
APPLICATION of purchase money in partition, 26.
ASSETS, pledging, 36.
under power, 36.

BAILIFF, charged with wilful default, 26.
BIDDINGS, opening abolished, 35.
BILL for partition, when retained, 6.
BILL or plaint for partition, account prayed, 12.
certainty of shares required in, 8.
deeds, relief prayed as to, 13.
defendants out of possession, averments as to, 11.
frame of, 11.
injunction prayed, 12.
prayer, 13.
receiver prayed, 12.
sale prayed, 12.
BILLS of sale, 38.

CERTIFICATE after inquiries in partition, 18.
of Commissioners, confirming, 22.
quashing, 22.
of partition in Chambers, 25.
CHAMBERS, partition in, 19, 24.
production in, 14.
supplying defect of proof in, 17.
CHANCERY, jurisdiction of, in partition, how acquired, 6.
transfer from, to County Court, 33.
CLAIM, adverse to defendant in partition, 10.
plaintiff in partition in possession, 11.
COAL, rights of co-owners as to, 27.
CO-HEIRESSES, partition between, 22.
COMMISSION of partition, 19.
new, when ordered, 23.
plaintiff sues out, 20.
share must be first ascertained, 20.
COMMISSIONERS of partition, certificate of, 22.
divided, 22.
duties of, 20, 21.
names, how settled, 20.
production before, 20.
return, when set aside, 21.
COMMON deed, question as to construction of, 16.
documents, custody of, 14.
thing, sale of, 3.
COMPOSITION deed, 37.
CONSOLIDATION of mortgages, 39.
CONSTRUCTION, question of, in partition, 16.
CONSTRUCTIVE trusts, 37.
CONTEMPT in not producing documents, 21.
of Court, 44.
CONTINGENT interest, 36.
remainder, barring, 23.
CONVEYANCE upon partition, disability, in case of, 23.
of share vested in lunatic, 24.
parties to, 9.
when necessary under decree for partition, 7.
CO-OWNER allowed for repairs, 27.
for improvements, when, 27.
farming common land, 27.
liability for occupation, 27.
grass cut, 27.
minerals, 27.
timber, 27.
use, 27.
ouster of, 27.
right to account against, 26.
CO-OWNERS, receipts of, 3.
rights of, at law, 6.
waste by, 6.
CO-OWNERSHIP, aliquot parts not in, 8.
chattels personal of, 4.

CO-OWNERSHIP—*continued.*
inconvenience of, 3.
what kind of, partible, 7, 8.
COSTS, debt under Debtors Act, 35.
disclaiming defendant, 16.
in County Court after transfer, 35
in specific performance, 40.
of abortive sale, 39.
of appeal, 39.
of defaulting trustee, 38.
of motion to stay pending appeal, 35
revivor for, 35.
scale of, 45.
where no jurisdiction, 33.
where suit in County Court competent, 34.
COSTS in partition suit, 27, 28.
adverse litigation of, 28.
charged on share, 28.
of defendant in posesssion of whole, 28.
of infant, 28.
of lunatic, 28.
of married woman, 28.
old rule, 27.
present practice, 28.
COUNTY COURTS Act, 1867, 33.
Orders, 34.
CREDITORS, advertisements for, 36.
CREDITORS' deed, 37.

DAMAGES prayed for, 40.
where vendor has no title, 39.
DECREE, production before or after, 14.
service of, on absent parties, 18.
DECREE at hearing, 17.
where title of plaintiff not proved, 8.
final, 18.
in partition suit, against absent party, 17.
conditional, at hearing, 18.
equities bound by, 9.
final, as to title deeds, 14, 15.
inquiries, for, 11.
inquiries only directed, 17.
partition, for, 11.
sale, for, 11.
unborn persons bound by, 10.
DEEDS, bringing into Court, 13.
final order as to, on partition, 14.
orders as to, in partition, 13.
prayer as to, 13, 15.
production of, 13.
production before Commissioners, 14.
DEFECT, when plaintiff may supply, 17.

DEFENCE in partition suit, 15.
against decree for sale, 17.
denial of plaintiff's title, 16.
deposit of deed prayed, 17.
sale prayed, 16.
settled account, 17.
special relief prayed, 17.
DEFENDANT in partition suit, 8.
added by amendment, 12.
contingent remainder in respect of, 9.
equitable interest, having, 9.
executory interest, in respect of, 9.
fee, to suit, by owner of, 9.
in possession, costs of, 28.
incumbrancers, 9.
liable to account, 26.
life tenants, to suit by, 9.
mortgagee, 10.
one only need be interested, 11, 17.
out of jurisdiction, 17.
out of possession, dismissed, 11.
costs of, 11.
right of, to trial at law, 16.
particular estate to suit by owners of, 9.
possession not necessary, 10.
remainderman, 9.
reversioner, 9.
settlement of share, 9.
tenant in tail, 9.
termor, to suit by, 9.
DEPOSIT by trustee, 38.
in foreclosure suit, 39.
interest, where mortgage by, 39.
of documents in Court, 13, 15.
in Registrar's Office, 14.
vendee's lien for, 41.
DEPOSITIONS under commission of partition, 22.
DESTRUCTION, co-tenant restrained from, 29.
DEVISE of residue specific, 35.
DISCLAIMER, costs of, 16.
DISCOVERY in County Court, 34.
DISMISSAL of bill,
title not proved, 8.
without prejudice, 16.
DIVISION and sale, right to, 3.
Roman law as to, 4, *note*.
Scotch law, as to, 4, *note*.
DIVISION by Commissioners, 21.
DOCUMENTS, affidavit of, 35.
deposit of, in Court, 13.
final order as to title deeds, 14, 15.
how far evidence in partition, 21.
production before Commissioners, 14, 20.

DOCUMENTS —*continued.*
production of, 13.
in County Court, 34.
DRY trustees, not parties in partition, 11.

EQUITY of redemption, not equitable assets, 36.
EQUITY to a settlement, 45.
EQUITIES bound by decree merely, 9.
EQUALITY of partition, 22.
ERRORS, condition of sale against, 45.
ESTATE, division of, in partition, 21.
partition of, 25.
EVIDENCE, before Commissioners of partition, 20, 21.
upon partition in Chambers, 24.
EVIDENCES of title, 15.
EXCLUSION of co-tenant, 27, 29.
EXECUTOR *de son tort*, 36.

FARM, partition of, 21.
FINAL decree in partition, 18.
FORECLOSURE, 38.
FURTHER consideration in partition, 18.

GRASS cut by co-owner, 27.

HEARING, decree at, 17.
immediate partition at, 25.
production before or after, 14.
HEREDITAMENTS, partition of, 3.
HIGH bailiff abolished, 33.
HOUSE, partition of, 19, *note.*

IMMEDIATE partition at hearing, 25.
IMPROVEMENTS, when allowed to co-owner, 27.
INCLOSURE Commissioners, partition by, 24.
INCORPOREAL hereditament, partition of, 3.
INCUMBRANCER, when party in partition
of share, 9.
of whole, 10.
INCUMBRANCES, interrogatories as to, 12
INFANT, costs of, in partition, 28.
right of, to an account, 27.
INFANT'S legacy, 36.
INFERIOR Court, 33.
INJUNCTION against co-tenant, 28, 29.
prayer for, 13.
INQUIRIES, decree for, 11.
how prosecuted, 18.

INQUIRIES—*continued.*
not prayed for, 13.
where alone directed by decree, 17.
INQUIRY. See PARTITION SUIT.
as to shares, 20.
defendant out of possession not entitled to, 10.
parties interested, as to, 11.
INSOLVENT co-tenant, committing waste, 29.
INTEREST on legacy, 36.
in partnership accounts, 44.
what required in plaintiff in partition suit, 7.
INTERROGATORIES in County Court, 34.
INTERROGATORY as to settlement, 12.
INVESTMENT of trust funds, 37.

JOINT interest in deeds, 14, 15.
JOINT tenants, receipts of, 3.
JUDGMENT creditor, 40.
JUDGMENTS Law Amendment Act, 38.
JURISDICTION, costs where no, 33.
defendant in partition, out of,
of County Courts, 33.
of County Courts under Trustee Relief Acts, 33.
after transfer to Chancery, 34.
concurrent with Chancery, 33.
in specific performance, 33.
over creditor's deed, 37.
where officer of County Court is party, 34.
where defendant distant, 33.
where right to redeem denied, 38.
where trust constructive, 37.

LAND, in hand, rights of co-owners *inter se*, 3.
right to partition of, 3.
LAW, right to proceed at, 16.
LEASE, 39.
LEASEHOLDS, partition of, 19.
LEASES and sales of Settled Estates Act, 26.
LEGACY, charitable, 36.
interest on, 36.
LEGAL title, denied by defendant in partition, 16.
LEGATEES, marshalling for, 37.
LIEN of vendee, 41.
vendor, 41.
LOCKE KING'S ACT extended, 38.
LONDON (City) Court, 34.
LOT, casting, when adopted in partition, 22.
LUNACY of sharer in partition, 24.
LUNATIC, costs of, in partition, 28.

MAINTENANCE, 43.
MANOR, partition of, 25.
MANSION house, partition of, 21.
MARRIED woman, 36, 45.
costs of, in partition, 28.
MARSHALLING, 37.
MASTER in Chancery, power of, as to documents, 14.
MILL, partition of, 25.
MINERALS got by co-owner, 27.
MINES, rights of co-owners, *inter se*, 3.
MORTGAGE of entirety, 10.
MORTGAGEE, right of second, 39.
MUNIMENTS of title, bringing into Court, 13.
custody of, 14, 15.
prayer as to, 13.
production of, 14.

NEW trustee appointed to make partition, 23.
NEW trustees, appointment of, 22, 43.
NEXT friend, 45.
NON compos, 45.
NOTICE to debtor by one co-creditor, effect of, 3.

OBJECTIONS to sale, 17.
OCCUPATION by one co-owner, 3.
co-owner not liable for, 27.
OFFICER of County Court, suit against, 34.
OPENING biddings abolished, 35.
ORDER and disposition in bankruptcy, 39.
OUSTER of co-tenant, 26, 27.
by co-tenant, 29.
OWELTY of partition, 22.
direction as to, 22.

PARCENER, right of, to partition, 4.
PARK, partition of, 21.
PARTICULAR estate, owner of may obtain partition, 7.
PARTIES interested in partition, absence of, 17.
mode of ascertaining, 12.
inquiry as to, 18.
in partition suit, advertising for, 18.
served with decree, 8, 12.
PARTITION, ancient mode of effecting, 5.
bill for, 7.
by Inclosure Commissioners, 24.
chattels personal, none of, 4.
commission of, 7.
conveyances, when necessary, 7.
course in suit for, 7.
decree for, 7, 11, 17.

PARTITION—*continued.*
development of law of, 4.
immediate at hearing, 25.
how obtained, 4.
in Chambers, 24.
incorporeal hereditaments, of, 3.
mode of effecting, 19.
of advowson, 25.
of estate, 25.
of manor, 25.
of part of estate, 25.
of services, 25.
of villein, 25.
parties to suit for, 7.
plaint for, 7.
proposals for, 24.
real action for, 4.
right to, 3, 15, 18.
writ of, 4.
PARTITION SUIT, enquiry as to shares, 8.
when granted, 8.
plaintiff, 7. *See* PLAINTIFF IN PARTITION SUIT.
shares uncertain, 8.
PARTNERSHIP, accounts, 43.
interest, 44.
sale of share in, 39, 43.
PAYMENT, into Court, of purchase money on partition, 26
to one co-owner, 3.
PLAINT, entry of, 33, 34.
PLAINTIFF in administration suit, interest required in, 36.
PLAINTIFF in partition suit, 18.
infant, 8.
inquiry not generally granted to, 8.
interest required in, 7.
out of possession, costs of, 28.
particular estate, owner of, 7, 9.
possession not necessary, 11.
reversioner may not be, 7.
termor may be, 7.
title, clear must shew, 11.
title of, not proved, 8.
title, when to prove in Chambers, 17.
PORTIONS, 36.
POSSESSION, defendant out of, averment in bill as to, 11.
costs of, 11.
not entitled to inquiry, 10,
when dismissed, 11.
plaintiff out of, 11.
POWER, assets under, 36.
PRAYER, as to deeds, 13, 15.
PRIORITIES, settling, 39.

PRODUCTION, covenant for, when required upon partition, 13.
of documents after hearing, 14.
before Commissioners, 14.
before hearing, 13.
in Chambers, 14.
in County Court, 11.
PROPOSALS for partition, 24.
PROXIMITY, ground for allotment upon partition, 21.
PUFFERS, 40.
PURCHASE money, application of, in partition, 26.

RECEIPT by co-owners, 3.
RECEIVER in partition suits, 29.
prayer for, 13.
REDEMPTION, 38.
time for, 39.
REGISTRAR of County Court, 45.
REGISTRAR'S office, production in, 14.
RELEASE by mortgagor, 38.
RELIGIOUS education of wards of Court, 43.
RENT due to co-owners, 3.
REPAIRS, co-owners allowed for, 27.
RESIDENCE of defendant, 34.
RESIDUARY devise held specific, 35.
RETAINING bill for partition, 16.
REVERSIONS, Act as to sale of, 41.
REVERSIONER cannot obtain partition, 7.
REVIVOR for costs, 35.
RIGHT to account against co-tenant, 26.
ROLT'S ACT, 10, 16.
ROMAN law of partition, 4.

SALE, abortive, in foreclosure suit, 39.
decree for, in mortgagee's suit, 39.
SALE in lieu of partition, 16, 18, 25, 29.
decree for, 11, 17.
objections to, 16.
of part of estate, 25.
ordered, though not prayed, 13.
prayer for, 13.
SAPLINGS, co-tenant restrained from cutting, 29.
SCOTCH law of partition, 4.
SENIORITY when regarded in partition, 22.
SERVICE of decree for partition, 18.
SERVICES, partition of, 25.
SETTLED account, 36.
as defence to partition suit, 17.
SETTLEMENT, interrogatory as to, 12.
SHARES in partition numerous, 23.
undivided, tenants of, 5.

SPECIAL relief in partition suit, 12.
SPECIALTY debt, 36.
SPECIFIC performance, 39, 40.
jurisdiction in, 33.
where price unascertained, 39.
STATUTE of Limitations, 37.
acknowledgment, 38.
STAYING proceedings pending appeal, 35.
STONE quarried by co-owner, 27.
SUCCESSION duty, 45.
SUMMONS, 33, 43.
for production, 21.
SURVEYS, custody of, after partition, 15.
SURVEYORS, evidence of, 24.

TENANTS of undivided shares, rights of, after partition, 5.
TENANTS in common, receipts of, 3.
TERMOR may obtain petition, 7.
TIMBER, rights of co-owners of, 3.
unseasonable, cut by co-tenant, 29.
TITLE deeds, 13, 15.
defence, where deposit of, prayed, 17.
TITLE, denial of, as defence in partition, 16.
disputed, in partition, 10.
formal defect in plaintiff's, 17.
muniments of, 13, 15.
when doubtful, 40.
when good, 40.
when to be tried at law, 11, 16.
TRADE, setting up infant in, 43.
TRANSFER from County Court, 34.
to County Court, 33, 45.
TREASURER of County Court, 33.
TRUSTEE ACTS, 23, 26, 42.
TRUSTEE, assignee in bankruptcy is a, 42.
in default, costs of, 37, 38.
non compos, 42.
vendor of copyrights when a, 42.
TRUSTEES, dry, of share, 11.
purchase money upon sale of partible property paid to, 26.
TRUSTEE RELIEF ACTS, 41, 42.

UMPIRE in partition, 23.
unborn persons bound by decree, 10.
extinguishing rights of, 23.

VESTING orders in partition, 23.

VIEW by Commissioners of Partition, 21.
VILLEIN, partition of, 25.
VOLUNTARY settlement, 37.

WARD of Court, 43.
religious education of, 43.
settlement upon marriage of, 43.
WASTE by co-tenant when restrained, 29.
WILFUL default, when co-owner charged with, 26.
WITNESSES, attendance of, before Commissioners, 20.
examination of, in partition, 20.
WRIT of partition, 4, 5, 10.

THE END.

RAYNER AND HODGES, PRINTERS, FETTER LANE, E.C.

Rbb 24.5.68
IN 869